No. 15-797 *** CAPITAL CASE ***

Title: Bobby James Moore, Petitioner
v.
Texas

Docketed: December 18, 2015

Lower Ct: Court of Criminal Appeals of Texas

Case Nos.: (WR-13,374-05)

Decision Date: September 16, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Dec 15 2015	Petition for a writ of certiorari filed. (Response due January 19, 2016)
Jan 19 2016	Brief amicus curiae of Constitutional Accountability Center filed.
Jan 19 2016	Brief amici curiae of The National Religious Campaign Against Torture, et al. filed.
Jan 19 2016	Brief amici curiae of International Organizations Interested in Medical Expertise, Psychiatry and Criminal Justice filed.
Jan 19 2016	Brief amici curiae of International Law and Human Rights Institutes, Societies, Practitioners and Scholars filed.
Jan 19 2016	Brief amici curiae of The American Academy of Psychiatry and the Law, et al. filed.
Jan 20 2016	Order extending time to file response to petition to and including February 18, 2016.
Feb 18 2016	Order further extending time to file response to petition to and including March 18, 2016.
Mar 18 2016	Brief of respondent Texas in opposition filed.
Apr 1 2016	Reply of petitioner Bobby James Moore filed.
Apr 6 2016	DISTRIBUTED for Conference of April 22, 2016.
Apr 25 2016	DISTRIBUTED for Conference of April 29, 2016.
Apr 27 2016	Record Requested.
May 6 2016	Record received from the Court of Criminal Appeals of Texas. The record is electronic.
May 9 2016	DISTRIBUTED for Conference of May 12, 2016.
May 16 2016	DISTRIBUTED for Conference of May 19, 2016.
May 23 2016	DISTRIBUTED for Conference of May 26, 2016.
May 31 2016	DISTRIBUTED for Conference of June 2, 2016.
Jun 6 2016	Petition GRANTED limited to Question 1 presented by the petition.
Jun 14 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jun 28 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 11 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 28, 2016.
Jul 11 2016	The time to file respondent's brief on the merits is extended to and including September 6, 2016.
Jul 28 2016	Brief of petitioner Bobby James Moore filed.

Jul 28 2016	Joint appendix filed.
Aug 3 2016	Brief amici curiae of American Civil Liberties Union, and the ACLU of Texas filed.
Aug 4 2016	Brief amici curiae of International Organizations and Individuals Interested in Medical Expertise and Psychiatry filed.
Aug 4 2016	Brief amici curiae of American Psychological Association, et al. filed.
Aug 4 2016	Brief amicus curiae of The American Bar Association filed.
Aug 4 2016	Brief amici curiae of The American Association on Intellectual and Developmental Disabilities, et al. filed.
Aug 4 2016	Brief amicus curiae of The Constitution Project filed.
Sep 6 2016	Brief of respondent Texas filed.
Sep 13 2016	Brief amici curiae of Arizona, et al. filed.
Sep 13 2016	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Oct 6 2016	Proposal of counsel for petitioner to lodge copies of opinions, cited in the reply brief, which are not available electronically.
Oct 6 2016	Reply of petitioner Bobby James Moore filed.
Oct 21 2016	SET FOR ARGUMENT on Tuesday, November 29, 2016
Oct 26 2016	CIRCULATED.
Nov 1 2016	Record requested from the Court of Criminal Appeals of Texas.
Nov 4 2016	Record received from the Court of Criminal Appeals of Texas is electronic.
Nov 29 2016	Argued. For petitioner: Clifford M. Sloan, Washington, D. C. For respondent: Scott A. Keller, Solicitor General, Austin, Tex.
Mar 28 2017	Judgment VACATED and case REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined.
May 1 2017	MANDATE ISSUED.
May 1 2017	JUDGMENT ISSUED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Clifford M. Sloan Counsel of Record	Skadden, Arps, Slate, Meagher & Flom 1440 New York Avenue, N.W. Washington, DC 20005 cliff.sloan@skadden.com	(202) 371-7000
Party name: Bobby James Moore		
Attorneys for Respondent:		
Scott A. Keller Counsel of Record	Solicitor General Office of the Attorney General P.O. Box 12548 Capitol Station (MC 059) Austin, TX 78711-2548 scott.keller@oag.texas.gov	(512) 936-1700
Party name: Texas		
Jeremy C. Greenwell	Assistant Attorney General P.O. Box 12548 Austin, TX 78711-2548 jeremy.greenwell@oag.state.tx.us	(512) 936-1400

Party name: Texas

Other:

Paulette Brown	President American Bar Association 321 North Clark Association Chicago, IL 60654-7598 abapresident@americanbar.org	(312) 988-5000

Party name: The American Bar Association

Constance De la Vega	University of San Francisco School of Law 2130 Fulton Street San Francisco, CA 94117 delavega@usfca.edu	(415) 422-2296

Party name: International Law and Human Rights Institutes, Societies, Practitioners and Scholars

James W. Ellis	1117 Stanford Drive, NE Albuquerque, NM 87131 ellis@law.unm.edu	(505) 277-2146

Party name: The American Association on Intellectual and Developmental Disabilities, et al.

Meir Feder	Jones Day 222 East 41st Street New York, NY 10017 mfeder@jonesday.com	(212) 326-3755

Party name: The American Academy of Psychiatry and the Law, et al.

Meir Feder	Jones Day 250 Vesey Street New York, NY 10281 mfeder@jonesday.com	(212) 326-3939

Party name: The Constitution Project

Lacey S. Gard	Assistant Attorney General Office of the Arizona Attorney General 1275 W. Washington Street Phoenix, AZ 85007-2997 cadocket@azag.gov	(602) 542-4686

Party name: Arizona, et al.

Paul Stephen Hessler	Linklaters, LLP 1345 Avenue of the Americas New York, NY 10105 paul.hessler@linklaters.com	(212) 903-9132

Party name: International Organizations and Individuals Interested in Medical Expertise and Psychiatry

Eric L. Lewis
Lewis Baach PLLC
1899 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20006
eric.lewis@lewisbaach.com
(202) 833-8900
Party name: The National Religious Campaign Against Torture, et al.

Kent S. Scheidegger
Criminal Justice Legal Foundation
2131 L Street
Sacramento, CA 95816
briefs@cjlf.org
(916) 446-0345
Party name: Criminal Justice Legal Foundation

Paul M. Smith
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001
psmith@jenner.com
(202) 639-6060
Party name: American Psychological Association, et al.

Brian W. Stull
American Civil Liberties Union Foundation
201 W. Main Street, Suite 402
Durham, NC 27707
bstull@aclu.org
(919) 682-9469
Party name: American Civil Liberties Union, and the ACLU of Texas

Elizabeth B. Wydra
Constitutional Accountability Center
1200 18th St., N.W., Suite 501
Washington, DC 20036
elizabeth@theusconstitution.org
(202) 296-6889
Party name: Constitutional Accountability Center

15 797

No. 15-___

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

Luke S. Varley
Alex Blaszczuk
Peter Horn
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Clifford M. Sloan
Counsel of Record
Donald P. Salzman
Lauryn K. Fraas
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

2. Whether execution of a condemned individual more than three-and-one-half decades after the imposition of a death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

TABLE OF CONTENTS

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. This Court Should Hold That A Prohibition On The Use Of Current Medical Standards In Determining Whether A Capital Defendant Is Intellectually Disabled Violates The Eighth Amendment 12

II. This Court Should Consider Whether An Excessive Period of Confinement Under A Death Sentence Violates The Eighth Amendment 26

CONCLUSION 35

APPENDICES 1a

Appendix A, Texas Court of Criminal Appeals Opinion 1a

Appendix B, State Habeas Trial Court Findings of Fact and Conclusions of Law on Claims 1-3 ..... 127a

Appendix C, State Habeas Trial Court
Findings of Fact and Conclusions
of Law on Claims 4-48..... 204a

TABLE OF AUTHORITIES

CASES

Page(s)

Ake v. Oklahoma,
470 U.S. 68 (1985) 17

Allen v. Ornoski,
546 U.S. 1136 (2006) 27

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Ex parte Briseno,
135 S.W.3d 1
(Tex. Crim. App. 2004) 6, 15, 16

Brumfield v. Cain,
135 S. Ct. 2269 (2015) 20, 21, 22

Chase v. State,
171 So.3d 463 (Miss. 2015) 17

Coleman v. Balkcom,
451 U.S. 949 (1981) 33

Correll v. Florida,
Nos. 15-6551, 15A424, 2015 WL
6111441 (U.S. Oct. 29, 2015) 27

Davis v. Ayala,
135 S. Ct. 2187 (2015) 30

Elledge v. Florida,
525 U.S. 944 (1998) 27

Enmund v. Florida,
458 U.S. 782 (1982) 32

Foster v. Florida,
537 U.S. 990 (2002) 27, 28, 30

Glossip v. Florida,
135 S. Ct. 2726 (2015) 27, 30, 33

Gomez v. Fierro,
519 U.S. 918 (1996) 27

Gregg v. Georgia,
428 U.S. 153 (1976) 29

Hall v. Florida,
134 S. Ct. 1986 (2014) ..... *passim*

Harmelin v. Michigan,
501 U.S. 957 (1991) 29

Ex parte Hearn,
310 S.W.3d 424
(Tex. Crim. App. 2010) 24, 25

Johnson v. Bredeson,
558 U.S. 1067 (2009) 27

Kennedy v. Louisiana,
554 U.S. 407 (2008) 26

Knight v. Florida,
528 U.S. 990 (1999) 27, 28

Lackey v. Texas,
514 U.S. 1045 (1995) 27, 29

Lindh v. Murphy,
521 U.S. 320 (1997) 3

In re Medley,
134 U.S. 160 (1890) 28, 31

Moore v. Johnson,
194 F.3d 586 (5th Cir. 1999) 2, 3

Moore v. Johnson,
521 U.S. 1115 (1997) 3

Moore v. State,
700 S.W.2d 193 (Tex. Crim. App. 1985) 2

Moore v. State,
No. 74,059, 2004 Tex. Crim. App. Unpub. LEXIS 11 (Tex. Crim. App. Jan. 14, 2004) 3

Roper v. Simmons,
543 U.S. 551 (2005) 26, 32

Ruiz v. Johnson,
154 F Supp. 2d 975 (S.D. Tex. 2001) 31, 32

Sasser v. Hobbs,
735 F.3d 833 (8th Cir. 2013) 18, 23

State v. Agee,
358 Or. 325 (2015) ..... *passim*

Simpson v. Quarterman,
341 F App'x 68 (5th Cir. 2009) 31

Smith v. Arizona,
552 U.S. 985 (2007) 27

Thompson v. McNeil,
129 S. Ct. 1299 (2009) 27, 28, 34

United States v. Montgomery,
No. 2:11-cr-20044-JPM-1, 2014 WL
1516147 (W.D. Tenn. Jan. 28, 2014) 18, 19

United States v. Wilson,
922 F. Supp. 2d 334 (E.D.N.Y. 2013) 16, 19

Valle v. Florida ,
132 S. Ct. 1 (2011) 27, 32

Williams v. Cahill ex rel. County. of Pima,
303 P.3d 532 (Ariz. Ct. App. 2013) 17

STATUTES

28 U.S.C. § 1257(a) 1

U.S. Const. amend. VIII 1

U.S. Const. amend. XIV 1

OTHER AUTHORITIES

American Association of Intellectual and
Developmental Disabilities,
Intellectual Disability: Definition,
Classification, and Systems of Supports
(11th ed. 2010) ..... *passim*

American Association of Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Support* (2012) 23

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2012) ..... *passim*

John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689 (2009) 24

Nancy Haydt et al., *Advantages of DSM–5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. REV. 359 (2014) 14, 15, 22

Brent E. Newton, *The Slow Wheels of Furman's Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41 (2012) 29

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bobby James Moore respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals under review (App. 1a-126a) is reported at 470 S.W.3d 481 (Tex. Crim. App. 2015). The findings of fact and conclusions of law of the state habeas trial court (App. 127a-203a (regarding claims one through three); App. 204a-287a (regarding claims four through forty-eight, *see* App. 287a)) are unreported.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals issued its judgment on September 16, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. On April 25, 1980, Bobby James Moore and two other individuals set out to rob a grocery store in Houston, Texas. During the course of the bungled robbery, one of the store's employees was shot and killed. The State charged Moore with capital murder as the shooter. The jury returned a guilty verdict on July 15, 1980, and, in the punishment phase, returned affirmative answers to the two special issues required under Texas law for imposition of the death penalty. R02621.[1] Moore was sentenced to death. R02622. The Texas Court of Criminal Appeals ("CCA") affirmed Moore's murder conviction and death sentence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113 (1986).

2. Following habeas proceedings in state and federal courts, a federal district court found that Moore was deprived of his right to the effective assistance of counsel during his trial and punishment phase, with prejudice in the punishment phase, and granted his habeas petition regarding his death sentence. The Fifth Circuit affirmed. It held that the failure of Moore's counsel to "investigate, develop or present mitigating evidence, including exculpatory evidence that the offense was accidental, during either phase of Moore's capital trial, constituted constitutionally deficient performance that prejudiced the outcome of the punishment phase of Moore's trial." *Moore v. Johnson*, 194 F.3d 586, 593 (5th Cir. 1999).[2] The court

---

[1] All record citations ("R") are to the Clerk's Record for the state habeas proceedings.

[2] The Fifth Circuit's decision was issued after this Court granted Moore's certiorari petition, vacated a previous decision,

ordered that Moore be given a new punishment proceeding or a sentence less than death.

The state court conducted a new sentencing hearing. On February 14, 2001, Moore again was sentenced to death. R02624-02625. He filed a motion to set aside the new sentence, which was denied. The State returned Moore to death row, where he was placed in highly isolated confinement—what the State calls "administrative segregation"—in Texas's Polunsky Unit on April 11, 2001. *See, e.g.*, R01825; R01827; *see infra*, 8-9 & n.4 (discussing administrative segregation).

Moore appealed. He also filed a motion to stay his appeal until the Texas legislature enacted legislation pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), on the ground that the Eighth Amendment barred the imposition of a death sentence against him in light of his intellectual disability. The CCA denied Moore's motion, and later affirmed his death sentence. It concluded, among other things, that it would not be cruel and unusual to execute him after decades on death row. *Moore v. State*, No. 74,059, 2004 Tex. Crim. App. Unpub. LEXIS 11, at *28 (Tex. Crim. App. Jan. 14, 2004), *cert. denied*, 543 U.S. 931 (2004).

3. On June 17, 2003, Moore filed a state court writ challenging his 2001 punishment retrial and death sentence. Moore raised forty-eight claims, including that the Eighth Amendment barred his execution because he was intellectually disabled, R00048-00061, and that execution after his prolonged

---

and remanded in light of *Lindh v. Murphy*, 521 U.S. 320 (1997). *See Moore v. Johnson*, 521 U.S. 1115 (1997).

confinement on death row would constitute cruel and unusual punishment. R00202-00215. Regarding the latter claim, Moore emphasized the psychologically traumatic conditions that he experienced in administrative segregation in Polunsky. R00209-R00210.

Following a January 2014 evidentiary hearing on Moore's *Atkins* claim, the state habeas court determined on February 6, 2014 that Moore's petition should be granted in part and denied in part. Regarding Moore's *Atkins* claim, the court concluded that Moore had established "that he meets the definition of mental retardation under the current guidelines of the [American Association on Intellectual and Developmental Disabilities ("AAIDD")], under both the [American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV ("DSM-IV") and V ("DSM-V")], and under the prevailing legal standards per [*Atkins*]." App. 202a ¶183; App. 203a ¶186.

The court determined that (i) Moore's "mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the [American Association on Mental Retardation ("AAMR")]," App. 201a ¶180; (ii) Moore's intellectual disability was supported by "the determination[s] of three highly qualified expert witnesses . . . that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning," App. 201a ¶181; and (iii) "[t]here is ample evidence that Mr. Moore suffered from significant deficits in adaptive functioning . . . before the age of 18," App. 201a ¶178. *See also* App. 202a ¶183 ("The record is replete with clear indications from his early childhood risk factors,

sub-normal intellectual functioning, and adaptive deficits that would qualify Mr. Moore as mentally retarded."). The court observed that Moore failed first grade twice (and was held back) and failed every grade thereafter (but was "socially promoted" each year) until he dropped out of school in ninth grade. App. 183a-190a. At the age of 13, Moore required "daily drills" from his teacher on topics such as the days of the week, the months of the year, and the ability to tell time. App. 187a ¶153.

The state habeas court denied Moore's requests for relief on non-*Atkins* grounds, including his claim that executing him decades after imposition of his initial death sentence would constitute cruel and unusual punishment. App. 279a-281a. The court stated that Moore could not "complain or show prejudice based on any alleged inordinate delay from the time of his conviction to his . . . [forthcoming] execution due to his multiple and continued efforts to attain appellate review and/or post-conviction relief in state and federal courts." App. 279a ¶149. The court did not mention that the appellate and post-conviction litigation had been necessary to remedy one constitutional violation (ineffective assistance, which rendered the first death sentence unconstitutional) and attempting to remedy another constitutional violation (the *Atkins* claim, which the habeas court found meritorious).

4. The CCA held that the state habeas court erred by relying on current medical standards governing intellectual disability rather than a superseded twenty-three-year-old standard, and accordingly refused to grant Moore habeas relief on his *Atkins* claim. App. 5a-6a. The CCA explained that it "continue[s] to follow the . . . 1992 definition of intel-

lectual disability that [it] adopted in [*Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)] for *Atkins* claims presented in Texas death-penalty cases." App. 5a. Despite its recognition that the medical community's "conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided," the CCA determined that the habeas court erred in "us[ing] the most current position, as espoused by the AAIDD, regarding the diagnosis of intellectual disability rather than the test that [the CCA] established in *Briseno*." App. 6a. The CCA asserted that the obligation to "implement *Atkins*'s mandate" rests with the State's legislature, not the judiciary. App. 5a. With this threshold issue resolved, the court proceeded to consider Moore's claim.

First, the court determined that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning," based solely on its consideration of two of the seven IQ scores in the record: Moore's "78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989." App. 63a, 73a. The CCA determined that these two scores placed him "above the intellectually disabled range," and that, for that reason alone, he was not intellectually disabled. App. 75a. Although the CCA stated that it would apply a "standard error of measurement" of five points, App. 74a, it decided not to credit the below-70 low end of the range for the 74 IQ score, App. 74a-75a. The CCA also chose to disregard several other IQ scores in the record, including Moore's 57 IQ score at age 13 and his 59 IQ score at age 54. *See* App. 63a-74a. And, although the CCA acknowledged *Hall v. Florida*, 134 S. Ct. 1986 (2014) at the

outset of its opinion, App. 7a, it did not comply with *Hall*'s holding that IQ results are not mechanically determinative, or considered in isolation. App. 63a-75a. Nor did the CCA consider that *Hall* applied current medical standards, rather than the abandoned medical standards invoked by the CCA.

Second, the CCA held that "[e]ven if [Moore] had proven that he suffers from significantly sub-average general intellectual functioning, his *Atkins* claim fails because he has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning." App. 75a. The court explained that its *Briseno* evidentiary factors "weigh[ed] heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning." App. 89a.

The CCA affirmed the trial court's denial of relief on the remaining grounds—including Moore's claim that executing him after prolonged confinement under sentence of death would violate the Eighth Amendment—without explanation. *See* App. 92a-93a.

One CCA judge dissented from the *Atkins* holding. Judge Alcala disagreed that the CCA "properly 'continue[s] to follow the AAMR's 1992 definition of intellectual disability.'" App. 99a-100a (quoting App. 5a). She explained that, under *Atkins* and *Hall*, the CCA "must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and . . . [the CCA's] reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable." App. 104a. The dissent emphasized that "the continued application of the *Briseno* standard . . .

does not conform to the requirements of the federal Constitution," App. 125a, and explained, among other things, that the CCA "improperly applies a strict cut-off based on IQ scores" and "erroneously applies unscientific criteria to assess whether a defendant has adaptive deficits," App. 100a-101a. The dissent also criticized the majority for "[m]erely lamenting the Texas Legislature's failure to act in the decade since *Atkins* was decided," which "abdicates this Court's responsibility to ensure that federal constitutional rights are fully protected in Texas." App. 95a n.2.

5. Moore, now 56 years old, first was sentenced to death over 35 years ago, at the age of 20. Twice in the three-and-one-half decades since that imposition of the death sentence, the State signed death warrants and set his execution date: one death warrant was stayed less than 24 hours before he was to be executed, and the other only five days before the scheduled execution date. *Moore v. McCotter*, No. H-86-835, Order Granting Stay of Execution (S.D. Tex. Feb. 25, 1986); *Moore v. Collins*, No. H-93-3217, Order Granting Stay of Execution (S.D. Tex. Oct. 21, 1993).

For nearly fifteen years (since April 2001), Moore has been held almost continuously in "administrative segregation" in Texas's Polunsky Unit. *See, e.g.*, R01825; R01827; R02582-R02597.[3] As one element of his state habeas claim that it would be cruel and un-

---

[3] During sixty-nine days of this period, at the direction of the state habeas judge, Moore was in a county jail, not death row, for a court-ordered psychological exam. App. 46a. He also was held in a county jail for several weeks in the run-up to his January 2014 evidentiary hearing.

usual to execute him after his prolonged period on death row, Moore emphasized the isolated conditions he had experienced in administrative segregation on death row in the Polunsky unit: "inmates held in administrative segregation by the Texas Department of Criminal Justice [("TDCJ")] are deprived of even the most basic psychological needs and suffer 'actual psychological harm from their almost total deprivation of human contact, mental stimulus, personal property and human dignity.'" R03537-R03538 (citation omitted); *accord* R00209-00210. Pursuant to the Death Row Plan of the TDCJ, a death row segregation inmate spends approximately 22.5 hours per day alone in his cell and is ineligible for contact visits.[4]

---

[4] The TDCJ's plan is available online (http://tifa.org/wp-content/uploads/2014/02/Administrative-Segregation-Death-Row-Plan-1.pdf). *See also Scheanette v. Riggins*, No. 05-cv-00034, Docket No. 20-2, Aff. of Billy Hirsch, Assistant Warden for Death Row at the Polunsky Unit, ¶¶ 6, 9, 13 (Sept. 7, 2005) (death row inmates at Polunsky "are kept in their cells for 22½ hours per day"; "[c]ontact between inmates is not allowed as all death row assigned inmates are assigned to death row segregation"; "out of cell time is limited to recreation time and showers"; "televisions are not made available to offenders on death row"; and "death row inmates are not allowed physical access to the law library").

REASONS FOR GRANTING THE WRIT

This case presents two important questions, both of which raise fundamental Eighth Amendment issues: (1) the permissibility of prohibiting the use of current medical standards in assessing intellectual disability under *Hall* and *Atkins*, and (2) the permissibility of executing an individual after decades of confinement under a death sentence.

1. In *Hall* and *Atkins*, this Court established a fundamental constitutional principle: the Eighth Amendment bars the execution of persons who are intellectually disabled according to current medical standards. Faithfully applying the current medical definition of intellectual disability, the state habeas trial court determined that Moore is intellectually disabled and constitutionally ineligible for the death penalty.

In a startling decision, the CCA rejected the habeas court's determination, concluding that the court "erred by . . . employing the definition of intellectual disability presently used." App. 6a. It held instead that an outdated, superseded twenty-three-year-old definition of intellectual disability governed the constitutional inquiry and that Moore was not intellectually disabled under that standard.

The CCA's ruling sharply conflicts with this Court's decisions in *Atkins* and *Hall*, which emphasize that it is the duty of the judiciary to enforce the Eighth Amendment by relying on current medical standards when conducting the intellectual-disability inquiry. It also augurs the all-too-real possibility that intellectually disabled prisoners across the State of Texas will be condemned to their death—in violation of the Constitution—simply because they might

not have been considered intellectually disabled a quarter-century ago. And it conflicts with decisions of other state and federal courts, which apply current medical standards to *Atkins* claims. Review is needed to vindicate the constitutional prohibition against executing intellectually disabled persons and to ensure that *Atkins* and *Hall* do not become dead letters in the State that carries out far more executions than any other State. *See* Death Penalty Information Center, Executions by State and Year, http://www.deathpenaltyinfo.org/node/5741.

2. The Court also should now resolve the important issue whether execution after an excessively long period of confinement under a death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. Forcing a prisoner to endure decades on death row raises profound constitutional concerns. These concerns are even more pronounced when, as here, the condemned individual is forced to spend many years on death row largely confined alone in his cell. And because such prolonged death-penalty confinement thwarts the purposes that the death penalty is designed to serve, executing a prisoner initially sentenced to death decades ago would represent needless pain and suffering in violation of the Eighth Amendment.

These grave constitutional problems have particular force here because Moore originally was sentenced to death more than thirty-five years ago—giving rise to an exceptionally long period on death row. The ever-increasing frequency of extraordinarily long periods of confinement under a sentence of death underscores the need for this Court to address an issue it has not resolved: whether the Constitu-

tion permits executing prisoners after decades of sentenced-to-death confinement.

I. This Court Should Hold That A Prohibition On The Use Of Current Medical Standards In Determining Whether A Capital Defendant Is Intellectually Disabled Violates The Eighth Amendment.

Applying current medical standards, the state habeas trial court held that Moore is intellectually disabled and ineligible for the death penalty under *Atkins*. But the CCA reversed on the ground that Texas courts are *required* to apply a decades-old definition of intellectual disability to an *Atkins* challenge and that, under that standard, Moore is eligible for the death penalty.

This Court's review is necessary to ensure the continued vitality of a bedrock constitutional requirement first announced in *Atkins* and expounded two Terms ago in *Hall*: the Eighth Amendment bars the execution of a prisoner who is intellectually disabled under current medical standards. The CCA eschewed this core principle in favor of applying an outdated definition of intellectual disability that conflicts with the prevailing medical consensus. Abdicating its obligation to enforce the Eighth Amendment to bar the execution of intellectually disabled prisoners, Texas's highest criminal court has decided that Texas courts must continue to apply a 1992 standard of intellectual disability unless and until the State's legislature sees fit to enact a statute, even though the applicable medical standards for diagnosing intellectual disability have changed since that time. The State's approach defies both the Con-

stitution and common sense, conflicts with the approach taken by other state and federal courts, and warrants review by this Court.

1. In *Atkins*, this Court held that the Eighth Amendment prohibits the execution of persons with intellectual disability. Citing the impairments described in clinical definitions, *Atkins* concluded that defendants with intellectual disability bear diminished personal culpability "by definition." 536 U.S. at 318. The Court cited two clinical definitions with which those states already barring the execution of persons with intellectual disability "generally conform[ed]": the definitions adopted by the AAMR – since renamed the AAIDD – and the APA. *Id.* at 309 n.3, 317 n.22.

This Court subsequently reiterated that "clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. Because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose" intellectual disability, *id.* at 1993, a state's legal determination must be "informed by the medical community's diagnostic framework," *id.* at 2000. States may not "go[] against the unanimous professional consensus," *id.*, nor "disregard[] established medical practice," *id.* at 1995.

Both *Atkins* and *Hall* thus require courts to consult current medical standards. In each case, this Court defined the relevant medical standards by consulting the then-current views of the AAIDD/AAMR and the APA. Thus, whereas *Atkins* had looked to the AAMR's 1992 definition of intellectual disability, *Hall* was guided by the AAIDD's 2010 definition. *See Hall*, 134 S. Ct. at 2000; *Atkins*, 536 U.S. at 309 n.3.

And whereas *Atkins* had looked to the most recent text revision to the fourth edition of the APA's DSM (DSM-IV), published in 2000, *Hall* was guided by the fifth edition (DSM-5), published in 2013. *See Hall*, 134 S. Ct. at 1990, 1994-95, 2000-01; *Atkins*, 536 U.S. at 309 n.3. Indeed, *Hall* not only adopted the new standards' revised terminology but also relied on their shift of focus away from rigid reliance on IQ scores alone and toward a conjunctive and interrelated assessment of intellectual disability, with a greater emphasis on adaptive functioning. *See* 134 S. Ct. at 2000-01.[5]

The CCA reversed the state habeas court for complying with this Court's mandate in *Atkins* and *Hall* that courts must apply currently accepted medical standards in assessing a capital defendant's intellectual disability claim. *See* App. 6a-7a (while "[i]t may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability" have changed, any relevant scientific and medical developments "do not determine whether an individual is exempt from execution under *Atkins*"). Accordingly, Texas courts are now required to apply abandoned medical standards in assessing intellectual disability claims in capital cases. Such an outcome cannot be reconciled with *Atkins* and *Hall*, which make clear

---

[5] Although the basic diagnostic framework for intellectual disability has consistently looked to intellectual functioning, adaptive functioning, and age of onset, there have been major changes over time in the relationship between these factors and how they are evaluated. *See generally* Nancy Haydt et al., *Advantages of DSM–5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. Rev. 359, 362-67 (2014).

that the legal standard *must* be informed by current medical criteria.

Notably, the CCA did not even seriously consider the substance of the clinical changes acknowledged in *Hall*—much less apply them to Moore's claim. Instead, the court merely asserted mechanically that the legal standard it established in *Briseno* remains "adequately 'informed'" by medical standards and is "generally consistent with the AAIDD's current definition of intellectual disability," and that the state habeas court "erred by . . employing the definition of intellectual disability presently used by the AAIDD." App. 6a, 7a n.5. The court cited no authority for its "cling-to-an-abandoned-medical-standard" approach to protecting Eighth Amendment rights, and elided entirely the significant changes to prevailing medical standards since *Briseno*.[6]

Moreover, it is clear that, under the CCA's decision, outdated medical standards will be the basis of Texas's evaluation of intellectual disability indefinitely. The CCA emphasized that it will maintain its previous standard for intellectual disability irrespec-

---

[6] The one aspect of the updated medical standards that the court briefly mentioned—the DSM-5's statement that an individual's "deficits in adaptive functioning must be directly related to [his] intellectual impairments," App. 7a n.5—ignores not only the marked shift of the DSM-5 toward greater emphasis on adaptive functioning, but also that the DSM-5 defines intellectual impairments in terms of particular deficits, and deemphasizes IQ-score test results that *Briseno* requires be "related" to deficits in adaptive functioning. *Compare Briseno*, 135 S.W.3d at 7, *with* DSM-5 at 37-38; *see also* Haydt, *supra*, 82 UMKC L. Rev. at 379 ("The DSM-5 links deficits in adaptive functioning with co-occurring deficits in intellectual functioning and requires a careful examination of adaptive behavior for reliable interpretation of IQ scores.").

tive of any changes in medical standards "unless and until the Legislature acts, which [the CCA] ha[s] repeatedly asked it to do," App. at 7a, and which the Legislature has declined to do for more than a decade. Thus, intellectually disabled persons convicted of capital offenses under Texas law will have to seek relief under anachronistic medical standards that will only become even more outdated over time. It is clear, of course, that whether the Texas legislature acts or does not act has nothing to do with the state judiciary's Eighth Amendment obligation under *Atkins* and *Hall*.[7]

Compounding this problem and further stacking the deck against intellectually disabled prisoners is the fact that outdated medical standards are "very difficult (if not impossible) to apply in practice" with reliability, since clinicians testifying as expert witnesses are obligated to "set aside much of their training in psychological standards and to train themselves (for *Atkins* purposes alone) in the outdated standards existing" at some past date. *United States v. Wilson*, 922 F. Supp. 2d 334, 340 (E.D.N.Y. 2013) (rejecting argument that court should apply outdated standard). This problem is especially alarming because factfinders in the judicial process rely heavily on the expert testimony of clinical professionals to explain the nature of intellectual disability and to help them assess whether a particu-

---

[7] In *Briseno*, the CCA stated that it was providing "temporary judicial guidelines" pending legislative action. 135 S.W.3d at 5. As the dissent here explained, judicial calls for legislative action do not satisfy the court's "responsibility to ensure that federal constitutional rights are fully protected in Texas" by "uphold[ing] the federal Constitution as it has been interpreted by the Supreme Court." App. 95a n.2.

lar individual meets diagnostic criteria. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) (emphasizing professionals' role in advising factfinders regarding insanity).

The CCA's decision also creates a conflict and disagreement among state courts. If allowed to stand, it could persuade other states similarly to maintain standards for assessing intellectual disability that are not medically informed. Prior to *Hall*, some state courts diminished the significance of medical standards and rejected reliance on them. *See Williams v. Cahill ex rel. Cty. of Pima*, 303 P.3d 532, 543–44 (Ariz. Ct. App. 2013), *review denied* (Nov. 26, 2013). Since *Hall*, however, state courts addressing the issue consistently have held that current medical standards should be considered. *See, e.g., State v. Agee*, ---P.3d---, 358 Or. 325, 353-54 (2015) (remanding for a new *Atkins* hearing where "the trial court did not apply now-current medical standards in determining that [the] defendant had not met his burden of proof to show that he has an intellectual disability"); *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015) (acknowledging "new definitions of intellectual disability" that have been promulgated "[a]s part of the medical community's evolving understanding of intellectual disability and its diagnosis"; "adopt[ing] the 2010 AAIDD and 2013 APA definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of [Mississippi] in addition to the definitions promulgated in *Atkins* . . .").

In the most recent state case to address the issue, the Oregon Supreme Court reversed a trial court's determination that a defendant had not proven that he was intellectually disabled under *Atkins* because

the trial court "did not apply now-current medical standards." *Agee*, 358 Or. at 353-54. The court carefully considered the "significant change in the way that intellectual disability is diagnosed" under current medical standards, whereby "proof of 'significantly subaverage intellectual functioning'" is "no longer require[d]" and "intellectual functioning [is] interpreted in conjunction with adaptive functioning in diagnosing intellectual disability." *Id.* at 350, 353. Recognizing the "high level of scrutiny [] required in death penalty cases," the court determined that a ruling based on outdated medical standards "would 'create[] an unacceptable risk that [a] person[] with intellectual disability will be executed.'" *Id.* at 354 (quoting *Hall*, 134 S. Ct. at 1990)). Accordingly, it reversed and remanded for a new *Atkins* hearing, and directed the trial court to consider "the evidence presented in light of the standards set out in the DSM-5 and discussed in *Hall*." *Id.* The Oregon Supreme Court's decision, which requires its courts to consider current medical standards in assessing an *Atkins* claim, stands in direct conflict with the CCA's decision here, which prohibits courts from applying those same standards.

The CCA's decision also conflicts with the decisions of numerous federal courts, which, like their post-*Hall* state-court counterparts, routinely rely upon current medical standards to assess intellectual disability in capital cases. *See, e.g.*, *Sasser v. Hobbs*, 735 F.3d 833, 843-45 (8th Cir. 2013) (finding Arkansas's revised statute consistent with DSM–5); *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 WL 1516147, at *3-4 (W.D. Tenn. Jan. 28, 2014) ("federal courts have routinely and sensibly made reference to the most updated literature in the field"

when evaluating *Atkins* claims; "[t]he [c]ourt will rely on the two clinical definitions of [intellectual disability] promulgated by the AAIDD and the APA—the eleventh edition of AAIDD Manual, and the DSM-V—as they are the most current iterations of the authoritative resources on the field"); *Wilson*, 922 F. Supp. 2d at 341 & n.5 (relying on 2010 edition of the AAIDD Manual, which "reflects the AAIDD's view of the current best practices in the field"; "[t]he court is aware of no case in which a court has considered itself bound to apply outdated clinical standards in making an *Atkins* determination.").

2. The CCA's decision to prohibit consideration of current medical standards in assessing intellectual disability has life-and-death significance in this case. As reflected in the state habeas court's determination, application of the current (and constitutionally proper) standard for assessing intellectual disability compels the conclusion that Moore is intellectually disabled and exempt from the death penalty. It was only by applying outdated and non-clinical standards in its assessment of Moore's (i) intellectual functioning and (ii) adaptive deficits that the CCA was able to reach the opposite result. Review is required to ensure that Moore's life is not taken by the State in violation of the Constitution.

Intellectual Functioning. Under the first prong of its *Atkins* assessment, the CCA required Moore to prove that "he suffers from significantly sub-average general intellectual functioning, generally shown by an IQ of 70 or less." App. 63a. In conducting this inquiry, the CCA violated current medical standards by treating Moore's two above-70 IQ scores (a 74 and 78, with, according to the CCA, a standard error of measurement of five points) as dispositive of his *At-*

kins claim. *See* App. 63a, 75a (concluding that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning" based solely upon consideration of his IQ scores). This determination conflicts with the "holding in *Hall* . . . that it is unconstitutional to foreclose all further exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70." *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (internal quotation marks and citation omitted). Furthermore, current medical standards recognize that "'[a] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score.'" *Hall*, 134 S. Ct. at 2000-01 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("DSM-5")). As a result, "[i]t is not sound to view a single factor as dispositive" of "the conjunctive assessment necessary to assess an individual's intellectual ability" under those standards. *Hall*, 134 S. Ct. at 2000-01; *Agee*, 358 Or. at 350 (recognizing this "significant change in the way that intellectual disability is diagnosed"). The CCA erred, therefore, by "disregard[ing] established medical practice," *Hall*, 134 S. Ct. at 1995, in concluding that Moore failed to prove that he had significantly subaverage general intellectual functioning based on an assessment of his IQ scores of 74 and 78 alone.

Moreover, even if a strict numerical approach were acceptable under current medical standards, the CCA's analysis still would not comport with those standards because Moore's cherry-picked score of 74 falls "squarely in the range of potential intellectual

disability," and, in any event, the low-end of that score (as well as three others excluded by the CCA) falls below 70. *See Brumfield*, 135 S. Ct. at 2278 (state court's conclusion that petitioner could not possess significantly subaverage intelligence with IQ test result of 75 was "an unreasonable determination of the facts"); *Hall*, 134 S. Ct. at 2001 (rejecting Florida's "rigid rule" treating IQ score in the marginal range as dispositive). The CCA erroneously disregarded the low end of the IQ-score range produced by this test in part because of Moore's "history of academic failure," App. 75a, even though under current medical standards a finding of poor performance in school *supports* a diagnosis of intellectual disability, *see* DSM-5 at 38. The court also found that his IQ score might be in the high end of the range because he took the test while on death row, App. 75a, setting up a Catch-22 that *Hall* conspicuously avoided, *see Hall*, 134 S. Ct. at 1995 ("a score of 71 . . . is generally considered to reflect a range between 66 and 76"); Br. for Resp't at 3, 7, *Hall*, 134 S. Ct. 1986 (No. 12-10882) (test on which petitioner scored 71 was administered in 2002, long after death sentence had been imposed, with no suggestion that low end of range should be disregarded because he was on death row).

Adaptive Deficits. The CCA, while concluding that Moore "failed to prove . . . that he has significantly sub-average general intellectual functioning," App. 63a, nevertheless proceeded to analyze whether Moore suffered "significant and related limitations in adaptive deficits." App. 75a. In its analysis of this issue, the CCA likewise failed to comport with established medical practice in at least two significant ways.

First, the CCA departed from prevailing medical standards by using Moore's perceived adaptive strengths as a means by which to negate a diagnosis of intellectual disability. This is inconsistent with current medical standards, which place significant emphasis on adaptive *deficits*. *See Hall*, 134 S. Ct. at 2000–01; *Agee*, 358 Or. at 343–44, 353; DSM-5 at 37; Haydt, *supra*, 82 UMKC L. Rev. at 367. Indeed, under current standards, an individual's significant limitations in conceptual, social, or practical adaptive skills are not outweighed by his potential strengths in some adaptive skills. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 47 (11th ed. 2010) ("AAIDD Manual"); *see also Brumfield*, 135 S. Ct. at 2281 ("intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation'") (citation omitted). The CCA, however, has chosen to disregard this prevailing approach, and instead "consider[s] all of the person's functional abilities, including those that show strength as well as those that show weakness." App. 11a; *see also* App. 12a (finding that the state habeas court "erred" in following current medical standards by "consider[ing] only weaknesses in [Moore]'s functional abilities").

Thus, notwithstanding the DSM-5's "more read[y] acknowledge[ment] that people with intellectual disabilities are often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families," App. 112a-113a (dissenting opinion), and despite present AAIDD guidance that "[t]he diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail

or prison, or 'criminal adaptive functioning,'" AAIDD, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Support* 20 (2012), the CCA found that evidence of just such "adaptive skills" negated Moore's significant adaptive deficits in academic skills and social interaction. *See, e.g.*, App. 87a (criticizing defense expert's "minimization of the evidence that [Moore] had learned to survive on the street and in prison," and crediting state's expert who "saw evidence that [Moore] had developed adaptive skills in prison"); App. 80a-83a (finding the fact that Moore lived in the back of a pool hall, played pool there, and later played dominoes with another inmate while in prison to be substantial proof that he lacked adaptive deficits). By using "evidence of adaptive skills"—and especially by using evidence of such "skills" as surviving on the streets and in prison—to offset Moore's significant adaptive limitations, *see* App. 80a, 81a, 82a, 83a, 84a, the CCA broke with current medical standards. *See, e.g.*, *Sasser*, 735 F.3d at 848 (adaptive skills prong of clinical intellectual disability definition "does not involve balancing strengths against limitations. It simply requires deciding whether the evidence establishes significant limitations in two of the listed skill areas.").

Second, the CCA departed from current medical standards by completely discounting Moore's significant adaptive deficits based on an overly broad notion of "relatedness" that effectively imposes a causation inquiry not recognized by medical standards. As noted above, the CCA requires an *Atkins* applicant to prove that "his significantly sub-average general intellectual functioning is accompanied by *related* and significant limitations in adaptive functioning." App. 6a (emphasis added). The CCA

previously had explained that this requirement meant that "adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder.'" *Ex parte Hearn*, 310 S.W.3d 424, 428-29 (Tex. Crim. App. 2010). Here, in stark conflict with current medical standards, the CCA seized upon the word "related" and summarily determined that Moore's significant academic and social deficits "were caused by a variety of [other] factors" including "trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, . . . racially motivated harassment and violence at school, [and] a history of academic failure. . . ." App. 88a-89a. In so holding, the CCA completely disregarded current clinical guidance that other disorders and environmental challenges can, and frequently do, coexist with intellectual disability. *See* DSM-5 at 40 (observing that "rates of some conditions" are "three to four times higher" in individuals with intellectual disability "than in the general population"); AAIDD Manual at 46; John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 725–29 (2009).[8]

---

[8] Although the CCA declared that the state habeas court erred in relying upon a definition of intellectual disability that "omits the requirement that an individual's adaptive behavior deficits, if any, must be 'related to' significantly sub-average general intellectual functioning,'" App. 6a, this statement is without merit. In its findings, the state habeas court expressly acknowledged the CCA's holding in *Hearn*, 310 S.W.3d at 428-29, that adaptive deficits must be related to subaverage intellectual functioning instead of a personality disorder, App.161a ¶92, but, noting that no party had alleged that Moore suffered from a personality disorder, App. 161a-162a ¶94, found no reason to

On these outdated and unscientific bases, the CCA rejected the habeas trial court's finding—which was made based on current medical standards—that Moore had met his burden of showing the adaptive deficits given central importance under those standards.[9] Notably, Moore scored 2.5 standard deviations below the mean on a generally accepted standardized test of adaptive behavior, *see* App. 77a; and, according to the AAIDD, for clinical diagnostic purposes a score of approximately two standard deviations below the mean indicates "significant limitations," AAIDD Manual at 43. Even the State's expert witness acknowledged "limitations in [Moore]'s academic skills and some adaptive deficits in social interaction during the developmental period." App. 80a. Under current medical standards, a significant limitation in just one area of functioning is sufficient to establish intellectual disability when coupled with concurrent

---

question that Moore's adaptive deficits were related to his subaverage intellectual functioning, *see* App. 161a-162a ¶¶94-95. In any event, the state habeas court also expressly found that Moore was intellectually disabled under the DSM-5, App. 202a, which the CCA itself acknowledges, requires a determination that an individual's "'deficits in adaptive functioning must be directly related to [his] intellectual impairments' to meet the diagnostic criteria of intellectual disability.'" App. 7a n.5.

[9] As the dissent explained, the CCA also departed from established medical practice through its reliance on its "*Briseno* evidentiary factors," App. 90a-92a, which have been criticized for being based on non-medical criteria and stereotypes, such as the CCA's invocation of the fictional character Lennie from John Steinbeck's *Of Mice and Men* as the exemplar of the individual who might not be executed under *Atkins*. *See, e.g.*, App. 116a-118a; *see also* App. 97a and n.5 (citing numerous journal articles "criticiz[ing]" the *Briseno* Court for "applying an unscientific standard" to assess intellectual disability).

significant limitations in intellectual functioning, *see* DSM-5 at 33; AAIDD Manual at 46—as established by the record here.

Because there is no way to reconcile the CCA's determination that Moore is not intellectually disabled with current medical standards governing the assessment of intellectual disability, review is necessary to ensure that Moore—and many others like him—are not unlawfully executed.

II. This Court Should Consider Whether An Excessive Period of Confinement Under A Death Sentence Violates The Eighth Amendment.

"By protecting even those convicted of heinous crimes," the Eighth Amendment's prohibition on excessive punishment "reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man," and the Amendment thus "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311–12; *see also Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."). Applying these fundamental principles to prisoners languishing on death row, individual Justices have emphasized that execution after an excesexcessively long period of confinement under a death sentence presents a substantial and troubling ques-

tion regarding cruel and unusual punishment under the Eighth Amendment.[10]

The need for this Court's consideration is clear. In just the last decade, the average time between sentencing and execution has skyrocketed from eleven years to nearly eighteen years. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., joined by Ginsburg, J., dissenting). Prolonged confinement for many decades under sentence of death represents a sword of Damocles perpetually hanging just above the condemned individual's head. An excessive period of confinement under a death sentence is repugnant to the Founders' intent, and plainly contrary to the "dignity of all persons." It violates the Eighth Amendment.

The issue now is both ripe for this Court's review and urgent in light of the possibility that cruel and unusual punishment is being inflicted on condemned individuals. The Court should decide, once and for all, whether the Eighth Amendment places constraints on the amount of time that a prisoner is forced to live under the constant specter of a looming execution at the hands of the State.

---

[10] *See Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting); *Correll v. Florida*, Nos. 15-6551, 15A424, 2015 WL 6111441 (U.S. Oct. 29, 2015) (Breyer, J., dissenting); *Valle v. Florida*, 132 S. Ct. 1 (2011) (Breyer, J., dissenting); *Johnson v. Bredeson*, 558 U.S. 1067 (2009) (Stevens, J., statement); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (Stevens, J., statement); *id.* (Breyer, J., dissenting); *Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J., dissenting); *Allen v. Ornoski*, 546 U.S. 1136 (2006) (Breyer, J., dissenting); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting); *Gomez v. Fierro*, 519 U.S. 918 (1996) (Stevens, J., dissenting); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., statement.).

1. The Court's review is particularly warranted in this case. Moore initially was sentenced to death in 1980. The more-than-three-and-one-half decades that Moore has endured since imposition of his death sentence is an exceptionally long time. It outstrips the "astonishingly long" twenty-year period, *Knight*, 528 U.S. at 993 (Breyer, J., dissenting), and the "extraordinary" thirty-two-year period, *Thompson*, 129 S. Ct. at 1300 (Stevens, J., statement), in past petitions. If Moore ultimately is executed, he "will have been punished both by death and also by more than a generation spent in death row's twilight." *See Foster*, 537 U.S. at 993 (Breyer, J., dissenting).

More than a century ago, this Court highlighted the profound problems of a prolonged period of confinement under a death sentence. *In re Medley*, 134 U.S. 160, 172 (1890). As the Court explained, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place." *Id.*; *see also id.* (noting the "immense mental anxiety amounting to a great increase of the offender's punishment" that comes from the unpredictability of the execution date).

The Court's *Medley* decision flowed from views at the Founding. The Framers and members of the Founding generation "considered even delays of several months [of confinement under a death sentence] to be cruel and unusual—which reflected the prevailing view in England and the colonies at the time of America's independence." Brent E. Newton, *The Slow Wheels of* Furman*'s Machinery of Death*, 13 J.

App. Prac. & Process 41, 55–57 & nn.64–70 (2012) (summarizing views of George Washington, Thomas Jefferson, James Wilson, and John Marshall). Indeed, as a practicing lawyer in Virginia, John Marshall argued that "it is a Consideration of some weight . . . that the prisoner hath languished a long time in jail [awaiting execution], in a situation which must have added to the misories of imprisonment & the horrors of an execution, which agony alone hath suspended." The Papers of John Marshall, vol. II, 207–08 (Charles T. Cullen and Herbert A. Johnson, eds., U.N.C. Press 1977).

The Eighth Amendment, moreover, draws extensively from the English Declaration of Rights of 1689. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., plurality op.); *Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976). The English Declaration, in turn, has been interpreted to prohibit execution after excessive periods of confinement under a death sentence. *See, e.g., Lackey*, 514 U.S. at 1046-47 (Stevens, J., statement) (referring to the "conclusions by English jurists that 'execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights of 1689'" (citation omitted)).

The constitutional problems with excessive periods of confinement under a death sentence endure and are profound. Just last Term, Justice Breyer, joined by Justice Ginsburg, emphasized that "excessively long periods of time that individuals typically spend on death row, alive but under sentence of death" pose grave constitutional concern. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting, joined by Ginsburg, J.). "[A] lengthy delay in and of itself is especially cruel because it subjects death row in-

mates to decades of especially severe, dehumanizing conditions of confinement," including "uncertainty as to whether a death sentence will in fact be carried out" and "death warrants that have been issued and revoked, not once, but repeatedly." *Id.* at 2765-66.[11]

The constitutional problems with excessively long periods of confinement under a death sentence are severely aggravated where, as here (and as is common in death-penalty states), a prisoner on death row is kept alone in his cell for almost the entire day. "The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). Both the American Bar Association and the United Nations Special Rapporteur on Torture have sought to limit or ban solitary confinement. *See Glossip*, 135 S. Ct. at 2765 (Breyer, J., joined by Ginsburg, J., dissenting). Solitary confinement "bears 'a further terror and peculiar mark of infamy'" on prisoners on death row—bringing them "'to the edge of madness, perhaps to madness itself'" and "exact[ing] a terrible price." *Davis*, 135 S. Ct. at 2209-10 (Kennedy, J., concurring). Indeed, this Court long has recognized that solitary confinement aggravates the serious problems of extended confinement under a death penalty. *See Medley*, 134 U.S. at 171 (emphasizing "the solitary confinement to which the prisoner was subjected"); *id.* at 170 (explaining that, "[i]n Great

---

[11] Foreign authority likewise supports the conclusion that execution after an excessive period of confinement under a death sentence is cruel and unusual. *See, e.g., Foster*, 537 U.S. at 992 (Breyer, J., dissenting) (citing decisions of foreign courts, including the UK Privy Council and the European Court of Human Rights).

Britain, as in other countries, public sentiment revolted against this severity" of solitary confinement under a death sentence). Notably, in this case, the CCA acknowledged, in its discussion of Moore's *Atkins/Hall* claim, that Moore, in his prolonged period of death-penalty confinement, has exhibited "withdrawn and depressive behavior." App. 71a; *see also, e.g.*, R01551 (highlighting Moore's inattentive and unresponsive behavior, which necessitated a mental health inpatient psychosocial evaluation).[12]

2. An excessive period of confinement under a death sentence violates the Eighth Amendment for an additional, independent reason: it furthers nei-

---

[12] The CCA further acknowledged that, at one point during his prolonged confinement on death row, Moore actually sought to waive further appeals so that an execution date could be set (a request denied by the state habeas court). App. 46a-47a. The psychological toll of almost constant isolation led another death-row inmate at Polunsky to similarly request an execution date. *See Simpson v. Quarterman*, 341 F. App'x 68, 69-70 (5th Cir. 2009) (affirming a district court's determination that a Polunsky death-row inmate could proceed with execution and forego habeas review; recognizing inmate's statement that "being locked up in a [sic] isolated solitary cell of confinement 23/ and 24 hours per day isn't justice nor is it considered living – its cruel and unjust, therefore I'm really looking forward to my execution"); *see also* R00290-R00210, R003538 (Moore habeas submissions comparing the "similar[ity]" of his conditions to those in *Ruiz v. Johnson*, 154 F Supp. 2d 975 (S.D. Tex. 2001)); *Ruiz*, 154 F. Supp. 2d at 984–85 (noting the "extreme deprivations and repressive conditions of confinement" in the Texas solitary confinement units; concluding that Texas's solitary confinement units are "virtual[ly] incubators of psychoses—seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities"; and highlighting that "incidents of self-mutilation and incessant babbling and shrieking were almost daily events"), *appeal dismissed*, 273 F.3d 1101 (5th Cir. 2001).

ther of the objectives secured by the death penalty. This Court has identified "two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'" *Roper*, 543 U.S. at 571. And "[u]nless the death penalty when applied to those in [a particular prisoner's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982). Where, as here, there has been a prolonged period of confinement under a death sentence, actually carrying out the execution promotes neither deterrence nor retribution and, as a result, violates the Eighth Amendment.

First, executing a person in circumstances like those presented here does not further the death penalty's deterrence goals. Executing Moore after thirty-five years of imprisonment under threat of death penalty would yield little (or no) deterrent value above continued incarceration for life. *See, e.g.*, *Valle*, 132 S. Ct. at 2 (Breyer, J., dissenting) (deeming the "commonly accepted justifications for the death penalty . . . close to nonexistent in a case such as this one" and concluding that "[i]t is difficult to imagine how an execution following so long a period of incarceration [thirty-three years] could add significantly to that punishment's deterrent value"). Additionally, "the deterrent value of incarceration during that period of uncertainty [accompanying prolonged confinement under a death sentence] may well be comparable to the consequences of the ultimate step itself." *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring).

Second, execution after prolonged confinement under a death sentence fails to promote the aim of retribution. In the decades that pass after the commission of the crime and imposition of the death sentence, circumstances often change dramatically. In such a situation, life in prison likely fully accomplishes society's desire for retribution. *See, e.g.*, *Glossip*, 135 S. Ct. at 2769 (Breyer, J., joined by Ginsburg, J., dissenting).

The penological justifications for the death penalty are conspicuously attenuated—and even eliminated—after excessively long periods of confinement under a death sentence. Review is important to ensure that execution after inordinate time on death row does not take place when it lacks any legitimate societal value.

3. For several reasons, this Petition presents an especially compelling vehicle in which to resolve the often-posed but never-resolved question whether execution after a prolonged period of confinement under a death-penalty sentence violates the Eighth Amendment.

First, Moore has been confined under a death sentence since 1980—a remarkably long time even in an era of startlingly long periods of confinement on death row.

Second, Moore has been subjected to highly isolated "administrative segregation" for almost half that time.

Third, the principal causes of the extended period have been very substantial constitutional claims—nearly twenty years due to his successful claim that he was denied effective assistance of counsel in 1980, and at least twelve years due to his *Atkins* claim,

which prevailed before the state habeas court (which conducted the evidentiary hearing) and garnered a powerful dissent in the CCA (and failed in that court only because the court's decision conflicted with this Court's decisions, *see supra* pp. 12-26). Thus, Moore's extraordinarily long time on death row cannot be attributed to frivolous filings or litigation abuse.

Fourth, Moore also has been subjected to the signing and subsequent staying of two separate death warrants against him—one was stayed on the very day he was to be executed, and the other a mere five days before the scheduled execution. R02982-02983; R02901; *see, e.g., Thompson*, 129 S. Ct. at 1299 (Stevens, J.) (signing and staying of two death warrants produced "dehumanizing effects").

One additional point bears emphasis. This Petition gives the Court a straightforward opportunity to address the question presented without needing first to consider the high hurdles imposed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 3009. The case comes to the Court directly from state court and allows the Court to consider this fundamental issue on the merits.

In sum, this Court should decide whether execution after an extraordinarily long period of confinement under a death sentence comports with the Eighth Amendment's prohibition against cruel and unusual punishment. As individual Justices have explained, execution of a condemned individual in circumstances like Moore's is both cruel and unusual, and does not further the purposes of the death penalty. The Court should consider and resolve this important issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Luke S. Varley
Alex Blaszczuk
Peter Horn
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Clifford M. Sloan
Counsel of Record
Donald P. Salzman
Lauryn K. Fraas
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

December 15, 2015

APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for Writ of Habeas Corpus in Cause No. 314483-C in the 185th Judicial District Court Harris County

---

JOHNSON, J., delivered the opinion of the Court in which KELLER, P.J., MEYERS, KEASLER, HERVEY and RICHARDSON, JJ., joined. ALCALÁ, J., filed a dissenting opinion. YEARY, J. concurred. NEWELL, J., did not participate.

OPINION

In 1980, appellant was convicted of capital murder and sentenced to death for fatally shooting a seventy-year-old grocery clerk, James McCarble, in Houston, Texas, while committing or attempting to commit robbery. *See* TEX. PENAL CODE ANN. § 19.03(a). We affirmed the 1980 conviction and sentence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985). Following a grant of federal habeas corpus relief, the trial court held a new punishment hearing in February 2001. Appellant again received a death

sentence. We affirmed the trial court's judgment on direct appeal. *Moore v. State*, No. AP-74,059, slip op. (Tex. Crim. App. Jan. 14, 2004) (not designated for publication).

In this initial writ application challenging his 2001 punishment retrial and death sentence, applicant raises forty-eight claims for relief. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071. In January 2014, the habeas judge held a two-day evidentiary hearing on applicant's first claim for relief—the allegation that he is intellectually disabled and therefore exempt from execution under the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).[1]

Following the evidentiary hearing, the parties filed proposed findings of fact and conclusions of law. Applicant's proposed findings and conclusions were contained in a document entitled, "Addendum Findings of Fact and Conclusions of Law on Claims 1-3" (Addendum Findings). Despite the document's caption, applicant's proposed findings and conclusions addressed only his *Atkins* claim (i.e., his first claim for relief). The State's proposed findings of fact and conclusions of law addressed all of applicant's alleged grounds for relief.

---

[1] Mental-health advocates now generally favor the term "intellectually disabled" over the older term "mentally retarded," which they deem to carry pejorative connotations. *See Ex parte Cathey*, 451 S.W.3d 1, 4 n.4 (Tex. Crim. App. 2014). However, the terms refer to the same condition and may be used interchangeably. *See id.* In this opinion, we substitute the terms "intellectual disability" and "intellectually disabled" for "mental retardation" and "mentally retarded."

The habeas court signed applicant's proposed Addendum Findings. The Addendum Findings applied the definition of intellectual disability presently used by the American Association on Intellectual and Developmental Disabilities (AAIDD),[2] concluded that

---

[2] The DSM-IV states the diagnostic criteria for intellectual disability as follows:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test . . .

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 46 (APA, 4th ed. 1994) (DSM-IV).

The DSM-V defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (APA, 5th ed. 2013) (DSM-V). The DSM-V states that the following three diagnostic criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing [Criterion A].

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social

applicant is intellectually disabled under that definition, and recommended that we grant relief on his *Atkins* claim. [3] The Addendum Findings also concluded that applicant had established by a preponderance of the evidence that he is intellectually disabled under the diagnostic criteria stated in the fourth and fifth editions of the American Psychiatric Association's (APA's) Diagnostic and Statistical Manual of Mental Disorders (DSM), i.e., the DSM-IV and DSM-V.

The habeas court also signed the State's proposed findings of fact and conclusions of law after making certain handwritten alterations to the final page. Through its alterations, the habeas court: (1) indicated that applicant's grounds for relief should be granted in part and denied in part; and (2) adopted the State's

---

participation, and independent living, across multiple environments, such as home, school, work, and community [Criterion B].

C. Onset of intellectual and adaptive deficits during the developmental period [Criterion C].

See id. To meet the DSM-V's diagnostic criteria for intellectual disability, "the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A." *See id.* at 38.

[3] The AAIDD, which until 2007 was called the American Association on Mental Retardation (AAMR), is a professional non-profit association that advocates for the rights of the mentally impaired and those with developmental disabilities. *See Cathey*, 451 S.W.3d at 15 n.40. The AAIDD currently defines intellectual disability as a condition "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." INTELLECTUAL DISABILITY 5 (AAIDD AD HOC COMM. ON TERMINOLOGY AND CLASSIFICATION, 11th ed. 2010).

proposed findings and conclusions concerning claims four through forty-eight, as well as its recommendation that we deny relief concerning those claims. The habeas court made no findings or conclusions regarding applicant's claims two and three.

We filed and set the case to address applicant's *Atkins* allegation. We now deny relief on all of applicant's claims.

In *Atkins*, the Supreme Court determined that the execution of intellectually disabled individuals violates the Eighth Amendment, but left it to the States to develop appropriate ways to enforce the constitutional restriction. *See Atkins*, 536 U.S. at 317, 320. In *Ex parte Briseno*, citing the absence of legislation to implement *Atkins*'s mandate, we adopted the definition of intellectual disability stated in the ninth edition of the AAMR manual, published in 1992, and the similar definition of intellectual disability contained in section 591.003(13) of the Texas Health and Safety Code. *See Ex parte Woods*, 296 S.W.3d 587, 589 & n.4 (Tex. Crim. App. 2009); *Briseno*, 135 S.W.3d at 7.

Because our Legislature has not enacted legislation to implement *Atkins*'s mandate, we continue to follow the AAMR's 1992 definition of intellectual disability that we adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases. *See In re Allen*, __ S.W.3d __, __, Nos. WR-82,265-01 & WR-82,265-02, slip op. at *7–8 (Tex. Crim. App. May 13, 2015); *Woods*, 296 S.W.3d 587, 589. Thus, to demonstrate that he is intellectually disabled for Eighth Amendment purposes and therefore exempt from execution, an applicant must prove by a preponderance of the evidence that: (1) he suffers from significantly subaverage general intellectual functioning, generally

shown by an intelligence quotient (IQ) of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen. *See Ex parte Cathey*, 451 S.W.3d 1, 19 (Tex. Crim. App. 2014); *Ex parte Sosa*, 364 S.W.3d 889, 894 (Tex. Crim. App. 2012); *Briseno*, 135 S.W.3d at 7 n.25.

The habeas judge therefore erred by disregarding our case law and employing the definition of intellectual disability presently used by the AAIDD, a definition which notably omits the requirement that an individual's adaptive behavior deficits, if any, must be "related to" significantly sub-average general intellectual functioning.[4] The habeas court reasoned that, in *Briseno*, we derived our legal test for intellectual disability in capital cases from the AAMR's 1992 definition of intellectual disability. Because the AAMR's and APA's conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided, the habeas court concluded that it should use the most current position, as espoused byAAIDD, regarding the diagnosis of intellectual disability rather than the test that we established in *Briseno*.

It may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseno* were decided. Indeed, we have recently discussed the subjectivity surrounding the medical diagnosis of intellectual

---

[4] The diagnostic criteria set forth in the DSM-IV similarly does not require that an individual's adaptive deficits be related to significantly sub-average intellectual functioning. *See* DSM-IV 46.

disability and some of the causes for that subjectivity. *See Cathey*, 451 S.W.3d at 10 & nn. 22–23. But although the mental-health fields and opinions of mental-health experts inform the factual decision, they do not determine whether an individual is exempt from execution under *Atkins*. *See id.* at 9–10 (stating that we must apply our own judgment on the appropriate ways to enforce the ultimately legal prohibition on executing intellectually disabled offenders). The decision to modify the legal standard for intellectual disability in the capital-sentencing context rests with this Court unless and until the Legislature acts, which we have repeatedly asked it to do. *See Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010); *see, e.g., Allen*, __ S.W.3d at __, Nos. WR-82,265-01 & WR-82,265-02, slip op. at *7–8. We conclude that, at this juncture, the legal test we established in *Briseno* remains adequately "informed by the medical community's diagnostic framework." *See Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).[5]

Regarding *Briseno*'s first prong, "general intellectual functioning" is "defined by the [IQ]" and "obtained by assessment with a standardized, individually administered intelligence test." *See Ex parte Hearn*,

---

[5] We derived *Briseno*'s legal definition of intellectual disability from a medical definition that the AAMR had previously advocated. *See Woods*, 296 S.W.3d at 589 & 589 n.4; *Briseno*, 135 S.W.3d at 7 & n.26. *Briseno*'s legal definition remains generally consistent with the AAIDD's current definition of intellectual disability. Further, *Briseno*'s requirement—that any significant adaptive behavioral deficits be "related" to significantly subaverage general intellectual functioning—is consistent with the APA's current position on the issue. *See* DSM-V 38 (emphasizing that an individual's "deficits in adaptive functioning must be directly related to [his] intellectual impairments" to meet the diagnostic criteria for intellectual disability).

310 S.W.3d 424, 428 n.7 (Tex. Crim. App. 2010). There is a measurement error of approximately five points in assessing IQ, which may vary from instrument to instrument. *Id.* at 428. Therefore, when determining whether an applicant has met *Briseno*'s first prong, we consider the fact that any IQ score could actually represent a score that is five points higher or five points lower than the score that he actually obtained. *See id.*

In *Cathey*, we examined whether mental-health experts or factfinders should adjust IQ scores for the "Flynn Effect"[6] in making a determination of intellectual disability under *Atkins*. *See Cathey*, 451 S.W.3d at 14. We concluded that, although factfinders may consider the concept of the Flynn Effect in assessing the validity of a score obtained on a now "outmoded" or "outdated" version of an IQ test, they may consider that effect only in the way that they consider an IQ examiner's assessment of malingering, depression, lack of concentration, etc. *Id.* at 5, 18 n.54 (explaining that "outmoded" in this context "means simply that the test [at issue] was designed and normed several years earlier" and "not that there was a newer, 'better' test available" at the time). We stated that the IQ test score itself may not be changed. *Id.* at 18. In analyzing whether applicant's general intellectual functioning is significantly sub-average, the habeas court therefore erred by subtracting points from applicant's IQ scores for the Flynn Effect and considering both applicant's unadjusted and Flynn-Effect-adjusted IQ scores.[7]

---

[6] The "Flynn Effect" refers to the tendency of scores on IQ tests normed on a particular date to increase over time, as the tests' norms age. *See Cathey*, 451 S.W.3d at 12 -- 13.

[7] We recognize that the habeas court did not have the benefit of our opinion in *Cathey* when it entered its Addendum Findings.

For purposes of the Eighth Amendment, "adaptive behavior" refers to the ordinary skills that are required for people to function in their everyday lives. *Id.* at 19. We have cited with approval the AAIDD's grouping of adaptive behavior into three areas (conceptual skills, social skills, and practical skills) for purposes of making a clinical diagnosis of intellectual disability.[8] *See Hearn*, 310 S.W.3d at 428. Limitations in adaptive behavior can be determined by using standardized tests. *See id.* We have also recognized the APA's position, expressed in the DSM-IV, that for purposes of clinical diagnosis, a "significant limitation" is defined by a score of at least two standard deviations below either (1) the mean in one of the three adaptive behavior skills areas or (2) the overall score on a standardized measure of conceptual, social, and

---

However, neither the record in applicant's case nor the law on which the habeas court relied support its findings and conclusions concerning the Flynn Effect. In particular, the record does not support the habeas court's representation of the AAIDD's present stance on the Flynn Effect. *See* INTELLECTUAL DISABILITY 35, 37 (describing the Flynn Effect as one of the "challenging issues" in the measurement of intelligence and interpretation of IQ scores, and noting the limited circumstances in which the AAIDD approves of adjusting an IQ score downward for the Flynn Effect).

[8] In *Hearn*, we noted the AAIDD's breakdown of these behavioral areas:

> Conceptual skills include skills related to language, reading and writing, money concepts, and self-direction. Social skills include skills related to interpersonal relationships, responsibility, self-esteem, gullibility, naivete, following rules, and avoiding victimization. Practical skills are skills related to activities of daily living and include occupational skills and maintaining a safe environment.

Hearn, 310 S.W.3d at 428 n.9.

practical skills. *See id.* Although standardized tests are not the sole measure of adaptive functioning, they may be helpful to the factfinder, who has the ultimate responsibility for determining intellectual disability in the *Atkins* context. *See id.*

In the Eighth Amendment context, it is not sufficient for an applicant to establish by a preponderance of the evidence that he has significantly subaverage general intellectual functioning and significant limitations in adaptive functioning. *See id.* An applicant must also demonstrate by a preponderance of the evidence that his adaptive behavior deficits are related to significantly sub-average general intellectual functioning rather than some other cause. *Cf. id.* (stating that the applicant must show that his adaptive deficits were related to significantly subaverage general intellectual functioning rather than a personality disorder); ***Ex parte Blue***, 230 S.W.3d 151, 163–64 (Tex. Crim. App. 2007) (determining that the applicant had not made a prima facie case concerning adaptive deficits because his expert conceded that learning disabilities or an impoverished family background, or both, may have been responsible for applicant's alleged deficit). The habeas court in this case failed to make the relatedness inquiry.[9]

---

[9] The habeas court concluded that applicant was intellectually disabled under the DSM-V's diagnostic criteria. As we have discussed, *Briseno* is the applicable standard for the *Atkins* determination. But like *Briseno*, the DSM-V requires that an individual's adaptive behavior deficits are directly related to his significantly sub-average intellectual functioning. Because the habeas court did not engage in the relatedness inquiry, the record does not support its finding that applicant meets the DSM-V's diagnostic criteria.

In making the relatedness determination, the factfinder may consider the seven evidentiary factors that we developed in *Briseno*:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9. We look to the entirety of the record before us in an *Atkins* inquiry. *See Cathey*, 451 S.W.3d at 26–27 (stating that factfinders should "consider *all* possible data that sheds light on a person's adaptive functioning, including his conduct in a prison society, school setting, or 'free world' community"). In addition, we "consider *all* of the person's functional abilities," including "those that show strength as well as those that show weakness."

See id. at 27. The habeas court therefore additionally erred to the extent that it found that applicant's prison records were "not appropriate tools by which to exclude intellectual disability in capital murder cases" and considered only weaknesses in applicant's functional abilities. *See id.*

In failing to make the relatedness inquiry, the habeas judge's factual findings and legal conclusions left the second prong of the *Briseno* test unresolved. *See Ex parte Flores*, 387 S.W.3d 626, 634–35 (Tex. Crim. App. 2012) (stating that the rationale for the deference we generally accord to habeas courts disappears when the factual findings fail to resolve the necessary factual issues). In addition, our independent review of the record reveals that it does not support the habeas judge's findings or conclusions concerning applicant's Atkins claim. *See id.* (noting that the rationale for deference also disappears when the record does not support the habeas court's findings). In short, the habeas judge appears to have either not considered, or unreasonably disregarded, a vast array of evidence in this lengthy record that cannot rationally be squared with a finding of intellectual-disability. *Cf. Sosa*, 364 S.W.3d at 894. For these reasons, we do not adopt the habeas court's findings and conclusions regarding applicant's *Atkins* claim, but instead assume our role as the ultimate factfinder in this case. *See Flores*, 387 S.W.3d at 634–35; *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

We hold that applicant has not established by a preponderance of the evidence that he is intellectually disabled under *Atkins* and *Briseno*. Accordingly, applicant is not exempt from the death penalty, and we deny him relief on his first ground.

I. Factual and Procedural Background

The lengthy factual and procedural history of applicant's case is relevant to our adjudication of his *Atkins* claim and provides context for the testimony elicited by the parties at his 2014 evidentiary hearing.

A. Applicant's 1980 Capital Murder Trial

The evidence at applicant's 1980 trial showed that, on April 25, 1980, Anthony Pradia and Willie Albert "Ricky" Koonce visited applicant at Betty Nolan's house,[10] where applicant lived when he was not staying with his girlfriend, Shirley Carmen. Pradia testified that he, Koonce, and applicant each needed money for car payments. While the three men were playing dice, Koonce suggested that they commit a robbery, and Pradia and applicant agreed. Applicant provided the weapons for the robbery, specifically, a shotgun and a .32 caliber pistol. Applicant and Pradia hid the weapons in the trunk of Koonce's car. The three men then drove around various areas of Houston in Koonce's car, looking for a place in which to commit the robbery.

After taking turns casing the Birdsall Super Market, the three men settled on it as the place in which they would commit the robbery and negotiated how they would divide the proceeds. Because they were using his car, Koonce wanted a larger share of the proceeds. After some argument, Pradia and applicant agreed that they would each pay Koonce $200 from their shares. The men then discussed their roles in the robbery. They agreed that Koonce would

---

[10] Applicant and various other witnesses at his 1980 trial described Nolan as applicant's "play mother" or "play aunt." In 1980, applicant's trial counsel described a "play mother" as someone "that a young man in the black community turn[s] to in times of need."

enter the courtesy booth and take the money that was inside. Applicant would carry the shotgun and position himself at the courtesy booth so that he could guard the booth and watch the store's front entrance. Pradia would carry the pistol and empty the checkout registers.

The three men then entered the store. Pradia entered first, with the pistol in his pants. Koonce entered next. Applicant entered last.[11] The shotgun he was carrying was obscured by two plastic bags. Applicant and Pradia wore wigs. Applicant also wore sunglasses.

Applicant and Koonce approached the courtesy booth, which was staffed by store employees McCarble and Edna Scott. Koonce entered the booth, told McCarble and Scott that they were being robbed, and demanded money. Applicant, who by this time had removed the plastic bags from the shotgun, pointed the weapon at McCarble and Scott through the booth's window. When Scott screamed that the store was being robbed, applicant pointed the shotgun at McCarble, looked down the barrel, and shot him in the head. McCarble died instantly.

Applicant, Pradia, and Koonce ran from the store and got back into Koonce's car, where applicant stated

---

[11] In a written post-arrest statement dated April 28, 1980, Koonce asserted that applicant wanted to walk behind him so that no one would see the shotgun that applicant was carrying. Koonce did not testify at applicant's 1980 trial and his statement was not offered into evidence at that proceeding. However, in 1992, applicant filed his second application for a writ of habeas corpus pursuant to Article 11.07. The State included Koonce's statement as an exhibit to its response.

that he had shot the man in the booth.[12] The men fled the scene. Koonce drove back to Nolan's house to drop applicant off and to allow Pradia to retrieve his car. The men then split up. Applicant spent the night of the offense at Nolan's house.

Witnesses provided a license-plate number and descriptions of the getaway vehicle and perpetrators, which quickly led Houston Police Department (HPD) homicide detectives to arrest Koonce. While searching Koonce's vehicle, officers discovered Pradia's wallet and identification, which Pradia had inadvertently left behind. Following Koonce's arrest, Pradia turned himself in. Based on information in Koonce's and Pradia's statements, detectives obtained a warrant for applicant's arrest. During a consensual search of Nolan's house, investigators found a shotgun hidden between the mattress and box springs of applicant's bed.

Applicant, who left Houston on the day after Koonce gave his statement, remained at large. HPD detectives were unable to ascertain applicant's whereabouts until May 2, 1980, when they received a tip that he could be found at his grandmother's residence in Louisiana. On May 5, 1980, ten days after the offense, Louisiana authorities arrested applicant at his grandmother's house pursuant to a fugitive warrant. Incident to the arrest, Louisiana officers discovered a small suitcase containing a pistol and $612 in cash. Applicant, who previously had a full head of hair, had shaved his hair down to the scalp.

---

[12] According to Koonce's statement, *see supra* note 11, applicant asserted that he shot McCarble because he believed that McCarble had been reaching for a gun.

HPD detectives traveled to Louisiana, took applicant into custody, and returned him to Houston. In Houston, applicant gave a written statement in which he admitted to participating in the robbery and to killing McCarble, although he asserted that McCarble's death was accidental.[13] According to applicant, during the screaming and panic that ensued after Scott cried out, he "suddenly fell backwards and the butt of the gun hit [his] arm and the gun went off." Applicant claimed that he later learned that the man in the booth had been shot. Applicant "[swore that he] was not trying to kill the old man and the whole thing was a[n] accident."

Applicant testified twice at his trial, first at a hearing on his motion to suppress his statement and later during the defense's guilt-innocence case-in-chief. The State cross-examined applicant on both occasions. At the suppression hearing, applicant denied giving or signing the statement. He asserted that one or more of the interrogating officers had beaten him when he refused to cooperate. Although he acknowledged that his signature was on the statement, applicant argued that his interrogators must have traced it from a blank piece of paper that

---

[13] The record shows that this was not the first account of the offense that applicant gave to law-enforcement authorities. At applicant's 2001 punishment retrial, former Louisiana State Trooper Charles Webb II testified that he participated in applicant's May 5, 1980, arrest in Louisiana. Webb stated that, before Texas detectives arrived, he administered *Miranda* warnings to applicant and conducted a tape-recorded interrogation. Webb testified that applicant made an oral statement in which he admitted participating in the robbery, but denied being the shooter.

he signed after being told that he would be released if he did so.

When he later testified in front of the jury, applicant again denied giving or signing the statement. Applicant testified that he was "quite sure" that someone who had been to prison before (as he had) would know better than to sign a confession. Applicant also denied any involvement in the offense, asserting that he was in Louisiana when the robbery and McCarble's death occurred. Applicant's eldest sister, Clara Jean Baker, also testified for the defense and corroborated applicant's alibi.

With the third perpetrator's identity at issue, the State presented rebuttal evidence that applicant had committed robberies at two other grocery stores just days before McCarble's murder. The earlier robberies occurred in a similar manner to the robbery in which McCarble died, with applicant wielding a shotgun and guarding the stores' courtesy booths while accomplices took money.

The jury found applicant guilty of capital murder. At the punishment phase, pursuant to applicant's stipulation, the State introduced his penitentiary packet. The penitentiary packet showed that applicant had four 1977 felony convictions (three for burglary of a habitation with the intent to commit theft and one for aggravated robbery) for offenses he committed in December 1976 and January 1977. Before accepting the stipulation, the trial court questioned applicant directly to determine whether his stipulation was voluntary, knowing, and intelligent.

Applicant's trial counsel did not call any witnesses or present any evidence at the punishment phase.

Based on the jury's answers to the special issues, the trial court sentenced applicant to death.

B. Applicant's Initial Direct Appeal

The trial court appointed Richard Bonner, one of applicant's trial counsel, to represent applicant on direct appeal. After receiving multiple extensions of time, Bonner filed an appellate brief for applicant in July 1983.

Between October 1980 and July 1983, the trial court and this Court received numerous *pro se* motions and pleadings from applicant. The documents concerned applicant's desire to participate in his appeal; need for access to the record; growing displeasure with Bonner's appellate representation; and dissatisfaction with the trial court's failure to appoint another attorney or to allow applicant to represent himself on appeal pursuant to *Faretta v. California*, 422 U.S. 806 (1975). In October 1983, applicant's dissatisfaction culminated with his filing of a *pro se* petition for a writ of mandamus, in which he asked us to require the trial court to dismiss Bonner and to allow applicant to represent himself on appeal.

We remanded the case to the trial court for a *Faretta* hearing, which the trial court held on November 2, 1983. *See Ex parte Moore*, No. WR-13,374-01 (Tex. Crim. App. Oct. 5, 1983) (not designated for publication). George L. Walker, the 1980 trial judge, presided. Applicant advocated on his own behalf and presented five exhibits in support of his request to proceed *pro se*. Applicant's exhibits, which were admitted into evidence, included letters that he had written to Bonner regarding the appeal.[14] At the

---

[14] In addition to correspondence between applicant and Bonner regarding the appeal, applicant's exhibits included

hearing, applicant read several of those letters aloud without any apparent difficulty. When it became evident that applicant was unaware that Bonner had filed a brief, the trial court recessed the hearing for an hour to allow applicant to review the pleading. When the hearing resumed, the trial court questioned applicant to ascertain whether he understood and was satisfied with the legal issues that Bonner had raised. Applicant responded rationally and coherently, although he struggled somewhat to explain Bonner's legal arguments to the trial court. At the hearing's conclusion, after applicant reaffirmed that he was willing to accept new appellate counsel, the trial court allowed Bonner to withdraw and appointed John H. Ward. After considering the claims raised by Bonner and Ward, as well as claims raised by applicant in a "Supplemental *Pro-Se* Brief For The Appellant," filed-stamped February 26, 1985, we affirmed the conviction and sentence. *Moore v. State*, 700 S.W.2d 193, 195 (Tex. Crim. App. 1985). The trial court set applicant's execution for February 26, 1986.

C. Applicant's Previous State and Federal Habeas Proceedings

In February 1986, the Supreme Court denied applicant's out-of-time petition for a writ of certiorari and application for a stay of execution filed through

---

correspondence between applicant, who is African American, and an attorney for the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund regarding Bonner's many requests for additional time to file a brief; correspondence between the NAACP attorney and Bonner concerning Bonner's delay in filing an appellate brief for applicant; applicant's *pro se* pleadings in the trial and other courts; and a docket sheet from this Court showing multiple extension requests filed by Bonner and *pro se* motions filed by applicant.

new appellate counsel, Carolyn Garcia. *See Moore v. Texas*, 474 U.S. 1113 (1986). We subsequently denied applicant leave to file an application for an original writ of habeas corpus, denied his first application for a writ of habeas corpus filed pursuant to Article 11.07, and denied his accompanying motion for a stay of execution. *See Ex parte Moore*, No. WR-13,374-02 (Tex. Crim. App. Feb. 25, 1986) (not designated for publication) (original writ application); *Ex parte Moore*, No. WR-13,374-03 (Tex. Crim. App. May 19, 1986) (not designated for publication) (first Article 11.07 application).

After we denied the motion for stay of execution, applicant's counsel filed a petition for a writ of habeas corpus and motion for a stay of execution in federal district court. The federal district court granted a stay. In June 1987, after determining that applicant's petition contained an unexhausted claim, the federal district court dismissed applicant's petition without prejudice to refiling upon exhaustion of the claim in state court. *See Moore v. Johnson*, 194 F.3d 586, 601 (5th Cir. 1999).

On April 6, 1992, now represented by attorneys Rick G. Strange, Richard R. Fletcher, and Kristi Franklin Hyatt, applicant filed his second Article 11.07 application. In relevant part, applicant alleged that trial counsel rendered ineffective assistance by pursuing an alibi defense and, in furtherance of that defense, persuading applicant and his sister, Clara Jean Baker, to perjure themselves at the 1980 trial. Applicant further alleged that trial counsel were ineffective for failing to investigate, discover, and present mitigating evidence at the punishment phase. Relying in part on *Penry v. Lynaugh*, 492 U.S. 302 (1989), which the Supreme Court decided after his

federal habeas petition's dismissal, applicant for the first time alleged that trial counsel should have discovered and presented evidence that he experienced a troubled childhood, as well as evidence that his intellectual functioning fell in the intellectually disabled or borderline range. To support the allegations, habeas counsel attached some of applicant's school and prison records, as well as affidavits executed in 1992 by three of applicant's siblings (Clara Jean Baker, Colleen McNeese, and Ronnie Moore) and applicant's brother-in-law, Larry Baker.

The school records attached to applicant's 1992 writ application included his academic, attendance, and cumulative health records, as well as scores that he obtained on the Iowa Test of Basic Skills (ITBS) given in third through sixth grades. The records also included the report of applicant's 1965 pre-kindergarten school medical examination. The examining doctor recommended psychological testing, commenting, "Child is very withdrawn—maybe retarded but most likely emotional problems."

The school records additionally included two IQ scores. In 1971, when he was twelve years old and in fifth grade, applicant obtained an IQ score of 77 on an Otis-Lennon Mental Abilities Test (OLMAT). When he was thirteen years old and in sixth grade, applicant was referred to Marcelle Tucker, M.Ed., for a psychological evaluation because he was performing below grade level, was withdrawn, and took no part in class unless called upon. In her report, Tucker stated that, on January 24, 1973, she gave applicant a Wechsler Intelligence Test for Children (WISC) and two tests of perceptual-motor coordination, specifically, a Bender Visual Motor Gestalt (Bender Gestalt)

test and a Goodenough Draw-a-Man test.[15] Tucker reported that applicant obtained a full scale IQ score of 78 on the WISC and "mental age" scores of eight years, eleven months on the Bender Gestalt and nine years, six months on the Goodenough.

Tucker noted in her report that applicant was then attending his third elementary school. In describing applicant's appearance and test behavior, Tucker described him as "nice looking" and "neatly dressed -- very up-tight -- did not use left hand even to hold paper when it skidded." In remarks concerning applicant's test results, Tucker again noted his test behavior: "During testing, [applicant] was extremely controlled. He made only the barest minimum of movements. His answers were given in as few words as possible." Tucker continued:

> The disparity between [the] "Information" (4) and "Comprehension" (8) [subtests] on the WISC indicated that perhaps this is a child who has not been taught, but who can learn.
>
> Low scores on the Bender and Goodenough [tests] seem to be negated by the average scores on "Block Design" (9) and "Object Assembly" (9) [subtests] on the WISC.

Tucker recommended that applicant stay in regular classes, but suggested that the school modify his

---

[15] Witnesses variously refer to the Goodenough Draw-a-Man test administered to applicant by Tucker in 1973 (sixth grade) as "the Goodenough," "the Draw-a-Man," and "the Draw-a-Person." For consistency, we refer to the test as "the Goodenough." We note that the record shows that applicant also took a Goodenough test in first grade. Unless otherwise specified, references to "the Goodenough" in this opinion refer to the 1973 test.

program by using certain specific teaching techniques to strengthen his areas of academic weakness.

The Texas Department of Criminal Justice (TDCJ) records attached to applicant's 1992 writ application included a February 28, 1984 report of applicant's psychological evaluation by psychologist George Wheat. Wheat stated that he was conducting the review at the request of the Psychological Screening Committee to assist it with determining applicant's work-capable status.[16] Wheat stated that applicant self-reported "fairly regular [past] employment as [a] construction laborer and clothing sales clerk." Wheat also noted that applicant was neatly dressed and exhibited no hesitancy in answering questions. He stated that applicant's responses "were appropriate to his 9th grade educational level and indicated [an estimated full scale] IQ of 71." Wheat concluded that applicant was work-capable.

---

[16] In anticipation of the 2014 evidentiary hearing, the State filed applicant's complete TDCJ records. Those records included a Psychological Review Committee report of its January 11, 1984, interview with applicant, who was then twenty-four years old, to determine his work capability. The report and associated test forms reflected that applicant had been preliminarily screened with a psychological interview; an abbreviated Wechsler Adult Intelligence Scale-Revised (WAIS-R), on which he obtained an estimated full scale IQ score of 71; and a Minnesota Multiphasic Personality Inventory (MMPI), a personality test, which "revealed a valid profile which was consistent with significant probability of psychiatric disturbance. [Two-point-high] scale elevations were found on the psychotic scales." Based on its interview with applicant and his MMPI result, the committee found that applicant was "not psychologically clear" and ordered "[a] formal psychological and psychiatric work up." Wheat's evaluation followed.

The TDCJ records attached to applicant's 1992 application also showed that, in January 1989, following an internal quality-assurance audit, applicant was given a complete WAIS-R by a TDCJ psychologist. Applicant, who was thirty years old at the time, obtained a full scale IQ score that was reported as "not [falling within the] retarded range." The record currently before us shows that applicant obtained a full scale IQ score of 74 on the 1989 WAIS-R.

The habeas court held an evidentiary hearing on April 23, 1993, to address applicant's ineffective-assistance allegations. Judge Carl Walker Jr. presided. Dr. Robert J. Borda, a clinical neuro-psychologist, reviewed applicant's school and TDCJ records and testified for applicant. Borda stated that applicant's scores on the 1973 WISC and 1989 WAIS-R fell within the borderline range of intelligence (70–79) but asserted that applicant's "mental age" at the time of the offense was no greater than fourteen years.[17] Borda further asserted that applicant's failure to reach for falling papers during Tucker's 1973 WISC testing was unusual and consistent with behavior sometimes seen in brain-injured people. However, Borda acknowledged that the records he reviewed did not mention a head injury.

Despite his opinions regarding applicant's mental age at the time of the offense, Borda did not purport to diagnose applicant as intellectually disabled. Borda testified that IQ tests were developed to measure a

---

[17] At the 1993 hearing, Borda testified that "[m]ental age is the individual's intellectual functioning at any particular point in time referenced to what would be the average performance for a given age." He stated that IQ scores were originally defined as a person's "mental age divided by the chronological age in months typically times 100."

person's potential to succeed in an academic setting and acknowledged that someone who obtained IQ scores in the borderline range of intelligence might well be capable of functioning successfully in the everyday world. On cross-examination, the State asked Borda whether applicant was capable of formulating complex arguments concerning his trial representation. Borda testified that, based on the documents he had reviewed, he "[saw] nothing that would indicate that [applicant] has really severe deficits in communication skills. I think he's . . . able to communicate adequately."

Applicant's sisters, Clara Jean Baker and Colleen McNeese, and his brother-in-law, Larry Baker, also testified at the 1993 evidentiary hearing. [18] They testified that applicant's father, Ernest Moore Jr. ("Junior"), was a neglectful, physically and verbally abusive alcoholic who beat his wife, Marion, and their nine children, and threw applicant out of the family home when he was fourteen years old.

Clara Jean testified that applicant would watch their parents when they fought, which was often. Clara Jean asserted that applicant's observation made Junior angry and caused him to beat applicant. Clara Jean stated that Junior also beat applicant because applicant tried to protect the other children.

McNeese asserted that, although Junior beat her and her other brothers, he beat applicant the most. She testified that Junior threw applicant out of the house because applicant could not spell and Junior

---

[18] To distinguish Clara Jean and Larry Baker, we refer to them by their first names.

thought he was stupid.[19] McNeese stated that, after applicant was thrown out of the house, she and her siblings would sneak food to him at night until Junior discovered what they were doing and made them stop. McNeese acknowledged that Junior also forced her and her other brothers to leave home.[20]

Larry, who lived next to the Moore family as a teenager, stated that he had seen Junior strike applicant, as well as two of applicant's brothers. Larry testified that he could otherwise tell that applicant was suffering from some sort of physical abuse because applicant had bruises and appeared hungry, haggard, and unrested. Larry said that applicant was generally secretive about the abuse and reluctant to discuss his family situation, but he did talk to Larry about it a couple of times.

Concerning the allegation that Bonner was ineffective as trial counsel by suborning perjury, Clara Jean testified that her family retained Bonner after learning his name from a young woman whom applicant was dating at the time. Clara Jean admitted that she lied at the 1980 trial when she testified that applicant was with her in Louisiana at the time of the

---

[19] Although Ronnie Moore, the youngest of applicant's brothers, executed an affidavit in 1992 in support of applicant's ineffective-assistance claims, he did not testify at the 1993 hearing. In his 1992 affidavit, Ronnie stated that Junior forced applicant to leave home at age fourteen because applicant told Junior to stop beating their mother.

[20] In her 1992 affidavit, McNeese stated that the Moore children grew up in extreme poverty and that there never seemed to be enough to eat. She asserted that she and applicant twice suffered ptomaine poisoning after scavenging food from the trash. McNeese stated that, after the food-poisoning incidents, applicant solicited odd jobs from neighbors when he and his siblings were hungry and bought food with the money he earned.

offense. Clara Jean asserted that she lied because Bonner convinced her it was necessary for applicant to avoid the death penalty and because she wanted to help applicant.

Applicant also testified at the 1993 evidentiary hearing and was cross-examined. Regarding the allegation that trial counsel suborned perjury, applicant admitted that he signed the written statement offered against him at the 1980 trial and asserted that the statement recounted the offense exactly as it happened. Applicant stated that, although he also told trial counsel the truth about the offense, they advised him to testify at trial and deny giving the confession, which he did.

Applicant also testified that, after his arrest, he falsely told another inmate that he had a cache of jewelry. Applicant surmised that trial counsel heard the story because they spontaneously asked him if the story were true and wanted to know the jewelry's location and worth. Applicant stated that trial counsel implied that giving them the jewelry could increase his chances of a life sentence. To secure a good effort from trial counsel, applicant maintained the lie, telling counsel that the hidden jewelry was worth close to $1 million. Applicant initially avoided specifying a location for the jewelry by telling counsel that he did not think it would be a good idea to disclose it to them. Eventually, applicant told counsel that the jewelry was at his grandmother's house in Louisiana.

Regarding his background, applicant testified that his father, Junior, was an alcoholic who physically abused him as a child and threw him out of the house permanently at age fourteen. Applicant stated that he was beaten and ejected from the family home because he tried to prevent Junior from beating Marion.

Applicant stated that he needed to find a way to survive after Junior permanently threw him out of the house. Because it was difficult to simultaneously care for himself and attend school, he dropped out and became part of "street life." Applicant testified that he frequented pool halls and similar establishments; slept in the restroom or back of the pool hall; did not immediately try to live with anyone else because his siblings were helping him without their father's knowledge; obtained food by stealing it from stores; and later moved in with a friend.

Applicant testified that school had been difficult for him. As a student, he "really couldn't comprehend words as most kids would" and "it was difficult for [him] to read and write." Applicant asserted that he still had problems with reading and writing, but since being imprisoned, he had spent a lot of time studying and trying to develop himself. As a result, his skills had improved. When shown State's Exhibit 1, a typewritten *pro se* pleading titled, "Supplemental *Pro-Se* Brief For The Appellant," which was filed-stamped February 26, 1985, and a handwritten cover letter addressed from applicant to the Harris County Clerk, applicant testified that the brief looked familiar to him as a document that someone had helped him prepare. He stated that he knew the contents and purpose of the document and that he had a part in researching it.[21]

---

[21] At the 1993 hearing, McNeese acknowledged that applicant wrote to her from prison and that she would recognize his handwriting and signature. She identified applicant's handwriting in the cover letter.

Bonner testified at the hearing and denied the allegations made against him.[22] Bonner stated that applicant insisted before and throughout trial that he had an alibi and that counsel pursue such a defense. Bonner said that he spent a great deal of time talking with applicant during the course of his trial representation and that their conversations included discussions of trial strategy. Bonner never received the impression that applicant failed to understand the gravity of his situation or was unable to assist in his own defense; Bonner opined that applicant had assisted counsel very well.

On August 31, 1993, the habeas court entered findings of fact and conclusions of law and recommended that we deny relief on applicant's allegations. We determined that the record supported the habeas court's findings and conclusions and denied relief. *See Ex parte Moore*, No. WR-13,374-04 (Tex. Crim. App. Oct. 4, 1993). Meanwhile, the trial court set applicant's execution date for October 26, 1993.

On October 12, 1993, applicant filed his second petition for a writ of habeas corpus in federal court, raising the same claims that he advanced in his second Article 11.07 writ application. *See Moore*, 194 F.3d at 602. He additionally filed a motion for stay of execution, which the federal district court granted. In 1995, the federal district court found that trial counsel performed deficiently at both phases of trial, but that applicant suffered prejudice only as to punishment. *See Moore v. Collins*, No. H-93-3217, slip op. at 32 (S.D. Tex. Sept. 29, 1995). In 1999, the Fifth Circuit

---

[22] The record shows that applicant's other trial attorney, C.C. Devine, died shortly after applicant's 1980 trial and that, by the time of the 1993 evidentiary hearing, Bonner had been disbarred for reasons unrelated to his representation of applicant.

Court of Appeals affirmed the federal district court's determination that applicant was entitled to punishment relief. *See Moore*, 194 F.3d at 622.

D. 2001 Punishment Retrial

In February 2001, the trial court held a new punishment trial. The current habeas judge, Susan Baetz Brown, heard certain pretrial matters, but Judge Larry Fuller presided over jury selection and the evidentiary portion of the punishment retrial.

At trial, the State reintroduced the evidence that it had presented at the guilt-innocence and punishment phases of applicant's 1980 trial. It also introduced applicant's disciplinary reports for the period he was confined on death row before his original death sentence was vacated.

Those reports showed that, on June 24, 1983, after showering, applicant stopped at a cell to talk to another inmate and ignored three orders to return to his own cell. After refusing the third order, applicant told the reporting officer, "[Y]ou can't tell me what to do, come on out from behind those bars and make me get in my cell. You aren't man enough to put me down." During a later security check at applicant's cell, applicant told the officer, "[Y]ou get out from in front of my cell, you motherfucker, I wish these bars weren't here." On September 23, 1983, while being let out for recreation, applicant stopped at four different cells to talk to other inmates and ignored eleven orders by the escorting guard to proceed.

On January 23, 1984, applicant ignored orders to stop talking to another inmate and enter the day room. On March 9, 1984, applicant failed to report to his assigned work. When confronted, applicant falsely stated that an officer had given him the day off.

On April 18, 1986, applicant was found to possess a large quantity of pills for which he did not have a prescription. On April 23, 1986, when ordered to shave, applicant told the guard that everyone knew that he had a shaving pass. When ordered to show the pass, applicant refused. On October 3, 1986, while giving inmates their meal, a guard ordered applicant to move from a bench in the day room to a table. Applicant stood up, stated that he "just had to fuck with somebody," and then refused an order to return to his bunk.

On January 3, 1987, applicant refused an order to get a haircut, stating, "I'm not going to get one." On January 22, 1987, applicant was among a group of inmates brought to the day room and told to sit down facing the wall. Applicant created a disturbance by jumping up and yelling, "[F]uck this, we don't have to do this," and trying to get the other inmates in the day room to join him. When ordered to sit, applicant repeated, "No! [W]e don't have to do this!" As the guard approached him, applicant returned to the spot where he had been sitting but refused to sit down. Ultimately, the guard grabbed applicant by both arms and placed him face down on the day-room floor.

On November 17, 1987, a prescription-only pill was found in applicant's cell, wrapped in toilet paper. Applicant did not have a prescription for the medication. On June 23, 1988, applicant refused an order to shave, citing a medical condition.

On September 6, 1990, a stinger (an altered electrical cord used to boil water) was found in applicant's cell. On August 12, 1992, applicant, who was working as a death-row porter, refused an order to clean up a spill in the main hallway. He stated that it was not his job because he was a death-row porter,

not a hall porter. On March 30, 1995, applicant was found to possess matches and rolling papers, which inmates were prohibited from having.

Applicant did not testify at his punishment retrial. However, the defense called nine of applicant's family members to testify about applicant's background and the changes they had seen in applicant since he had been imprisoned on death row.

Marion Moore, applicant's mother, testified that the family had financial problems. She stated that she worked forty hours per week outside the home when applicant was small and that her husband, Junior, worked construction jobs on and off. She testified that Junior developed a drinking habit and would become frustrated with the children when he had been drinking. Marion testified that, in December 1971, applicant was hit in the head by a brick when he was on a school bus and that he received medical treatment for the injury a few days later.

Larry Baker gave testimony similar to that which he gave at the 1993 evidentiary hearing concerning Junior's verbal and physical abuse of the Moore children. Regarding Junior's verbal abuse, Larry elaborated that Junior treated the male Moore children differently than the female children. Larry stated that Junior would tell all of his sons that they were "worthless" and "no good."

When asked to describe what kind of person applicant was between the ages of thirteen and seventeen, Larry testified that applicant was athletic, had a dog and "really had a special relationship with it," and "was a quiet kind of guy sometimes." Larry asserted that he had seen changes in applicant since that time. Larry stated that he "felt initially that

[applicant] was not as intelligent as he ha[d] displayed lately." Larry said that applicant "shows advance [sic] toward intelligence. He reads a lot. His handwriting is excellent. His grasp of vocabulary has improved considerably. His presentation of himself is much better."

McNeese testified that the Moore family moved a lot and that they had been evicted on one occasion. As to Junior's physical abuse of applicant, McNeese gave testimony similar to that which she gave at the 1993 evidentiary hearing. She again acknowledged that Junior beat all of the children, but testified that Junior treated applicant differently from her other brothers and said that applicant did not seem like he was Junior's son.

McNeese also testified that she and applicant attended the same schools when they were young. She said that they first attended Atherton Elementary, at which the student body was predominately black. When applicant was about twelve, as part of a racial integration effort, they were bussed to Scroggins Elementary. McNeese testified that "it was really hard for us to attend [Scroggins] because the people didn't want us there." She testified that, when they were first attending Scroggins, applicant was hit in the head with a brick because the other students wanted them off the bus. She said that applicant missed school because of the brick incident.

McNeese, who is about eleven months younger than applicant, testified that she and applicant were placed in the same classroom at Scroggins so that she could help him. McNeese stated that applicant did not respond to the teachers, who did not realize that he could not read, and he would not participate in anything. McNeese attributed applicant's behavior in

class to the fact that he did not understand what was going on. She said that she overheard teachers discussing applicant and asking each other whether he were intellectually disabled or had a hearing problem. McNeese testified that when she was doing seventh-grade-level work, the teachers would give applicant third-grade-level work to do, and she would stay after class to help applicant with it.

McNeese testified that Hester House, a community center serving Houston's Fifth Ward, was a place where she and her siblings escaped from their situation. McNeese thought that applicant did better at Hester House than at school because "[i]t was the only place where he could really go without my dad messing with him." McNeese testified that applicant learned to swim at Hester House, became very good at swimming and enjoyed it, entered into swimming competitions, and at age thirteen, won an award for saving a deaf and mute boy from drowning.

Paravena Richardson, applicant's cousin, testified that she spent a lot of time in the Moore household as a child and attended school with applicant and some of his siblings. Richardson stated that they first attended Atherton Elementary but then were bussed to Scroggins Elementary, at which the student body was primarily Hispanic. Richardson stated that she was in the same classes with applicant at Scroggins and that the Hispanic students there treated him badly—calling him names, picking fights, and once hitting applicant in the side of the face with a brick. Richardson testified that, as a result of his treatment by the Hispanic students, applicant was withdrawn in class and kept to himself.

Richardson said that she had seen Junior, who was quite controlling and could be set off by the most minute things, become physically violent with his children. Richardson stated that Junior targeted applicant more than the other boys. Richardson did not know why and noted that Junior and applicant's older brother, Charles, had almost as poor a relationship.

Applicant's brother, Lonnie Moore, testified that he was a couple of years younger than applicant. When Lonnie was ten years old, he attended Scroggins Elementary with applicant. Lonnie testified that he and applicant were part of a group of students who were bussed to Scroggins to integrate it. Lonnie was aware at the time of racial tensions at Scroggins and of things that happened to applicant there.

Lonnie stated that his parents treated him and his younger siblings differently than they treated the older children. Unlike the older children, Lonnie and his younger siblings had to stay in the backyard. They were not allowed to play out in the streets with friends and would be watched over by their eldest sibling, Clara Jean. Lonnie testified that applicant and his other older brothers were not subject to the same restrictions. Lonnie saw Junior physically abuse applicant when applicant stood up for what he thought was right, which included protecting their mother from Junior's abuse. Lonnie testified that, due to the tension between applicant and Junior, applicant was not comfortable or able to relax at home.

Lonnie testified about gifts that applicant had made in prison for him, which included: clocks in the design of a church and a church cross, a jewelry box, and

picture frames.[23] Lonnie further testified that he had seen a big change in applicant since applicant had been on death row. Lonnie thought that applicant had gained direction and developed compassion, and noted that they now talked a lot about religion.

Applicant's brother, Johnny B. Moore, testified that he was four years younger than applicant. Johnny saw Junior hurt applicant, sometimes for no apparent reason, and at other times, because applicant was trying to stop their parents from fighting. When applicant was still living in the family home, applicant earned money by cutting grass. When the children did not have enough to eat, applicant would use his earnings to help feed his siblings.

Ronnie Moore, the youngest of applicant's brothers, testified that when their parents were gone, the older children—primarily applicant, Clara Jean, and McNeese—took care of the younger children. Ronnie stated that there was often no food in the house. On one occasion when applicant and McNeese were in charge of the younger children and there was no food, Ronnie saw applicant and McNeese eating from the neighbors' trash cans. He recalled that they contracted food poisoning.

Ronnie further testified that applicant worked on the weekends for a man named Collier, who mowed lawns, and that applicant also worked in a rest home. Ronnie testified that applicant used his earnings to help support the family. Applicant gave Ronnie money for lunch and their mother money for bills. Ronnie testified that, in addition to beating applicant, Junior would call applicant "stupid" and "dummy."

---

[23] Photographs of these items were admitted into evidence.

Cloteal Morris, applicant's mother's cousin, testified that applicant was quiet and well behaved as a young boy, but he was not an open child and never talked very much. She stated that applicant had written her beautiful letters from prison about church and religion. Alice Moore, applicant's maternal aunt, testified that applicant was quiet as a child and "seemed like a regular kid." She stated that applicant wrote letters to her from prison and described them as "just normal letters."

The defense also called Jo Ann Cross, a London solicitor. Cross became acquainted with applicant through her mother, who began corresponding with applicant in 1990. Cross began corresponding with applicant in 1993. Cross testified that applicant's writing style, spelling, grammar, and use of language had all improved during the period of their correspondence and that it continued to improve.

Cross further stated that applicant now showed "a greater deal of understanding of all sort of issues, be it culture issues [or] politics" than he had at the beginning of the correspondence. Cross explained that she had arranged for applicant to receive newspapers and articles and that they had discussed these materials in their correspondence. She testified that applicant had "absolutely" demonstrated an ability to understand and comprehend the events that she was discussing with him and that he had shown sympathy and happiness for her when it was appropriate. After her mother died in 1996, applicant wrote Cross a very moving letter about her mother's death. Applicant had also made and sent gifts for Cross and her mother, including a jewelry box with a prayer for peace inlaid in the lid and a musical jewelry box.

TDCJ guards testified that, while on death row, applicant obtained the status of a staff-support inmate, which allowed him to apply for jobs within the prison and enjoy certain privileges during his non-working time. Applicant's records showed that he successfully applied for jobs as a wing porter and barber and that he also worked in the shoe and garment factories.

A Harris County Jail guard, Jeff Dixie, testified that, while applicant had been in jail awaiting the retrial, he had seen applicant reading a newspaper. Another Harris County jailor, Kenneth Wayne Young, testified that he had written a motivational book, "Wakeup Call," and that the chaplain had given a copy to applicant. Young testified that applicant read "all the time" and that applicant introduced newly arrived or troubled jail inmates to Young's book.

The defense also called two expert witnesses to testify, Dee Dee Halpin and Bettina Wright. Halpin was an educational diagnostician with a master's degree in special education. Wright was a clinical social worker who held a bachelor's degree in psychology and a master's degree in social work.

Halpin stated that, at the defense's request, she reviewed applicant's educational records. These records reflected applicant's attendance, conduct and academic grades, academic achievement test scores, and IQ test results.[24] Halpin testified that applicant attended Atherton Elementary School from kindergarten through fourth grade. She stated that there was a recommendation during the kindergarten year that

---

[24] Halpin prepared a written summary of applicant's educational records, which was admitted into evidence at the punishment retrial.

applicant receive psychological testing because he was very withdrawn. Although the person who recommended testing commented that intellectual-disability was a possible cause for applicant's presentation, that person thought that emotional problems were the more likely explanation.

Halpin testified that applicant was promoted to first grade, but he made very poor grades that year, especially in all of the language areas, he tested "poorly" in reading and math readiness, and his eye-hand coordination was immature.[25] When applicant was retained a year in first grade, his grades remained weak, with the only significant change being that his conduct grade dropped from "good" to "needs improvement." When applicant was socially promoted to second grade at age eight, his grades remained about the same. Applicant attended summer school and was promoted to third grade, where his poor grades continued and his conduct dropped to "unsatisfactory," the lowest possible conduct grade. Halpin testified that applicant's score that year on the Iowa Test of Basic Skills (ITBS), a group-administered standardized achievement test, indicated that he was a third grader performing at a second-grade level.

Halpin testified that applicant was promoted to fourth grade, but his grades remained poor, and he continued to perform below grade level on the ITBS. He was promoted "on appeal" to fifth grade and began attending a new school, Scroggins Elementary. Applicant's grades improved from Fs to Ds, and his conduct grades for that year showed significant

---

[25] Halpin's written summary indicated that applicant took a Metropolitan Readiness Test (MRT) and a Goodenough Draw-a-Man test in first grade, obtaining a "low normal" result on the MRT and an "immature" result on the Goodenough.

improvement. When he took the ITBS that year, applicant's math score was within the average range, although his language score remained below average. When noting applicant's result on the OLMAT that applicant took that year (77 IQ), Halpin described the OLMAT as a group-administered IQ test.

Halpin stated that applicant attended a third elementary school for sixth grade. She testified that attending three different schools within three years would be difficult for any child. Halpin explained that, in the era in which applicant attended school, the grade in which certain skills were taught often varied between schools. As a result, a student who changed schools frequently in that era might miss being taught certain skills. In addition, changing schools disrupted continuity in a child's learning and required the student to make a social adjustment to the new environment.

Halpin stated that applicant's ITBS scores for sixth grade showed him to be performing two years below grade level. Applicant's records also showed that he took a Slosson Intelligence Test that year, at age thirteen.[26] Halpin testified that applicant "came out with a mental age of seven-and-a half and so his IQ was 57," which fell within the intellectually disabled range. But Halpin noted that the Slosson is an individually administered IQ test that strongly favors verbal skills. She asserted that a student with any kind of language difficulty would typically perform poorly on the Slosson and that applicant had consistently shown such language difficulties. In addition, Halpin testified that a notation in applicant's records

---

[26] The records that applicant submitted with his 1992 writ application did not mention a Slosson Intelligence Test.

stated that his Slosson IQ score of 57 was "minimal." Halpin explained that a "minimal" notation typically meant that the test administrator felt that the person actually functioned at a higher level.

Halpin was additionally skeptical of applicant's score on the Slosson because he subsequently took the individually administered WISC, which separately assessed verbal and nonverbal abilities. Within the overall IQ score of 78 that applicant obtained on the WISC, he obtained a verbal IQ score of 77 and a nonverbal or performance IQ score of 83. Halpin testified that, according to his school records, applicant remained in a regular classroom following the WISC testing.

Halpin testified that she had also reviewed a letter that applicant had recently written. She stated that, although the letter contained some errors, the language was "certainly coherent," "fairly complex," and "adult[-]like." Based on all the materials she reviewed, Halpin opined that applicant functioned in the low-average range of intellectual functioning and that he "definitely had some ability to learn that wasn't tapped early in his school years."

Wright testified that she had reviewed applicant's educational records and Dr. Borda's 1993 evidentiary hearing testimony. She also interviewed applicant twice, for a total of four hours. Wright concluded that applicant "was nowhere near retarded." She opined that applicant had an average IQ and that his ability to learn was "very intact."

Wright attributed applicant's difficulties in school to undiagnosed learning disabilities and emotional problems. She opined that his emotional problems stemmed from his learning disabilities, academic

failure, and self-described "scary" childhood. She concluded that the quietness and constrained movement noted in applicant's records were due to his fear rather than to any diminished intellectual functioning. She explained that applicant was a very vigilant and watchful child who carefully assessed situations before acting.

Wright testified that applicant's drug use exacerbated his difficulties in school. Applicant told Wright that he began to use drugs in fifth grade to "escape the pain." He began by using marijuana. By the time he was of junior-high and high-school age, Wright testified, applicant was using marijuana, alcohol, amphetamines, tranquilizers, and whatever else he could obtain.

In closing argument, defense counsel emphasized applicant's background. Defense counsel asserted that applicant did so poorly in school that he "was considered to be possibly [intellectually disabled]." But counsel asserted that "we learned later from the experts and other people who looked at [applicant's school records] that he wasn't really [intellectually disabled] at all, he was capable of learning." Counsel argued that "mostly what [applicant's] young life was about" was "lack of food, violence in the home[,] and one failure after another in school. . . . It was a cycle of violence in which there was no peace and no safety in the home." Counsel asserted that, in addition to physically abusing applicant, Junior Moore emotionally abused applicant by conveying the idea that he "wasn't any good, he wasn't smart, [and] he couldn't learn." Counsel argued that applicant "[was] not retarded, he was just treated like somebody that was retarded" and that it was not until applicant "[went] to prison[,] away from his family environment that [he

was] actually safe enough to be able to learn and grow and become the kind of person that he could have become had he come from a safe environment."

The trial court charged the jury pursuant to Article 37.0711. On February 14, 2001, in accordance with the jury's answers to the special issues, the trial court again sentenced applicant to death.

E. Direct Appeal from 2001 Punishment Retrial

Robert Morrow, applicant's punishment-retrial counsel, also represented applicant on the automatic direct appeal to this Court. *See* Art. 37.0711, § 3(g). On August 20, 2002, Morrow filed a brief on applicant's behalf. On the same date, he filed "Appellant's Motion To Stay Proceedings Under [*Atkins*] Pending Legislative Action, As An Alternative To Relief Requested In Appellant's Brief." Despite having argued at the punishment retrial that applicant was not intellectually disabled and having presented the testimony of two experts to support that theory, Morrow now asserted that applicant "ha[d] a strong claim of [intellectual-disability]" under the June 2002 Supreme Court opinion in *Atkins*. Morrow urged us to stay applicant's direct appeal until the Texas Legislature enacted legislation to implement *Atkins*'s mandate. We denied the motion on September 11, 2002.

On October 3, 2002, applicant filed a *pro se* "Motion for Leave to File Appellant's [*Pro Se*] Supplemental Brief." In the motion, applicant acknowledged that he was not entitled to hybrid representation, but stated that he wished to file a supplemental *pro se* brief to raise an additional point of error. In his *pro se* supplemental brief, applicant argued that Article 37.0711 was unconstitutional because it implicitly

placed the burden on the defendant to show that sufficient mitigating factors exist to warrant a life sentence rather than death. We denied applicant's motion on October 4, 2002, and later affirmed his sentence. *See Moore v. State*, No. AP-74,059, slip op. at *2 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 43 U.S. 931 (2004).

II. Current Habeas Proceedings

A. Applicant's Application and Supporting Exhibits

On June 17, 2003, through appointed habeas counsel Stephen Morris, applicant filed his current application pursuant to Article 11.071. In support of his request for an evidentiary hearing on his *Atkins* claim, applicant attached affidavits executed in 2003 by Gina Vitale, a social worker and his mitigation investigator, and Dr. Richard Garnett, a clinical psychologist. Vitale and Garnett each asserted that there was sufficient evidence of applicant's intellectual-disability, as defined in the tenth (2002) edition of the AAMR Manual or the DSM-IV, or both, to warrant an evidentiary hearing.[27] According to their affidavits, although Vitale interviewed applicant's relatives, neither Vitale nor Garnett personally assessed applicant. Instead, they based their opinions on their review of Vitale's interviews with applicant's family; affidavits and interview notes compiled by applicant's previous defense team; and some of applicant's records. Neither Vitale nor Garnett actually diagnosed applicant as intellectually disabled.

---

[27] The definitions of intellectual-disability contained in the tenth edition of the AAIDD Manual and the DSM-IV do not require that an individual's adaptive behavior deficits be linked or "related" to deficiencies in intellectual functioning. *See* INTELLECTUAL-DISABILITY 8; DSM-IV 37.

Vitale discounted applicant's 77 IQ score on the OLMAT, describing that instrument as a state-mandated, group-administered IQ screening tool, and she emphasized the 57 IQ score that he obtained on the Slosson. Vitale acknowledged applicant's WISC score (78 IQ), but asserted that his mental age scores on the concurrently administered Bender Gestalt and Goodenough tests reflected much lower IQ scores of 67 and 71, respectively.[28]

Garnett stated that the OLMAT is a group test that requires one to read. Due to evidence of applicant's inability to read, Garnett questioned the validity of applicant's OLMAT score. Garnett also asserted that applicant obtained a 67 IQ score on the Bender Gestalt and a 72 IQ score on the Goodenough test that he took in conjunction with the 1973 WISC.

B. Applicant's *Pro Se* Requests to Waive Further Appeals

The State filed an original answer in December 2003, followed by a supplemental answer in January 2004. On June 23, 2005, direct appeal counsel Morrow wrote to the current habeas judge, stating:

> It is my understanding that you recently received a request from [applicant] to discontinue his appeals and or [sic] pending writs. I received the same request. However, immediately after that, I received instruction from [applicant] that he no longer wishes to withdraw his writs or appeals. [Applicant] is dealing with the stress of Death Row and was

---

[28] According to her affidavit, Vitale arrived at these IQ scores for the Bender Gestalt and Goodenough tests by comparing applicant's mental-age score on those instruments against his chronological age at the time of testing.

> understandably upset when he wrote the first letter. [Applicant] wants to continue his post conviction efforts.

Despite Morrow's assertions, on October 3, 2005, applicant filed a "*Pro Se* Ex Parte Motion to Waive Further Appeal" in the trial court. Applicant correctly stated that he had been sentenced to death on February 14, 2001, after a new punishment trial; that the trial court had subsequently appointed Morrow to represent him on direct appeal; and that it had appointed Morris to prepare a postconviction application for a writ of habeas corpus. Applicant moved the trial court to dismiss Morrow and Morris, to find that he waived further appeals of his capital-murder conviction and death sentence, and to set his execution date.

On May 30, 2006, the current habeas judge held a hearing concerning applicant's *pro se* motion. Direct-appeal counsel Morrow appeared on behalf of applicant, who, by the parties' agreement, was not present. The court stated that, in response to applicant's 2005 letter and motion, it had ordered him moved from death row to the Harris County Jail for a psychological examination to determine his competency to withdraw his application. The court further stated that, as of the 2006 hearing date, applicant had been at the jail for sixty-nine days but had refused to speak with doctors. Therefore, the court said, no psychological examination could be completed. Counsel for both parties agreed to the court's factual recitation. Because no psychological examination could be completed, the court ordered applicant's habeas proceeding to continue, directed that he be returned to death row, and instructed Morrow to write

to applicant to explain why the court could not proceed with the *pro se* motion.

C. Applicant's Supplemental Filings in Support of His *Atkins* Claim

In 2009, current writ counsel, Pat McCann, substituted for Morris, who was permitted to withdraw. In late 2011, McCann filed a lengthy "Factual Supplement" in support of applicant's *Atkins* allegation. The Factual Supplement included documents that appeared to be notes taken by applicant's 1992 writ and 2001 punishment-retrial defense-team members, specifically, Kristi Franklin Hyatt, Anthony S. Haughton, Patrick Moran, and Jemma Levinson. The notes memorialized their interviews with applicant, various relatives, and Dr. Borda.

According to those notes, on November 14, 1991, applicant told Haughton that Junior Moore physically terrorized and abused applicant's mother and siblings just as badly as he did applicant; applicant was a slow learner who did not do well in school; and due to family moves and racial integration efforts, he attended several different schools. Applicant said that, when he dropped out of school around age fifteen or sixteen, he could barely read and started living "a street life." He had his first drink at age thirteen, and before going to prison at age seventeen, he regularly abused alcohol and drugs. In junior-high school, he started smoking marijuana and taking 7 to 14 Quaalude pills per day, and he tried methamphetamine. Applicant also reported that, after his first stint in prison, he started cooking and injecting "preludes."[29] Applicant stated

---

[29] We understand "preludes" to refer to phenmetrazine. *See United States v. Green*, 246 F.3d 433, 434 (5th Cir. 2001).

that he got stoned regularly, often combining preludes, marijuana, and alcohol.

According to the notes, in April 1993 (i.e., before the 1993 evidentiary hearing), Borda told Hyatt that he did not consider applicant intellectually disabled, although he believed that physical abuse, neglect, and substance abuse may have affected applicant's mental status at the time of the offense. Because applicant had never been tested for a personality disorder, Borda told Hyatt that he could not rule out schizophrenia or personality disorders. However, Borda said that he felt comfortable describing applicant as having at least below average intelligence, a learning disorder, and compromised social development. Borda believed that applicant had some sort of brain dysfunction, possibly from a frontal-lobe injury, which would result in a lack of impulse control and a diminished ability to think through the consequences of his actions. But Borda acknowledged to Hyatt that amphetamine abuse could cause "this personality defect."

The notes in applicant's Factual Supplement indicated that defense-team members interviewed applicant four times in 2000. Moran interviewed applicant in February and March of that year. During the interviews, applicant stated that his mother, Marion, would send him to look for Junior, who was often absent. Applicant would usually find Junior drunk and with another woman. Applicant observed that it probably angered Junior for applicant to find him in such a compromising position and that Junior may have beaten applicant harder than the other children to deter him from telling Marion.

Applicant stated that, after being permanently thrown out of the house, he could have stayed with

nearby friends. But because applicant felt ashamed, he instead spent the first night in a neighbor's garage.

Applicant said that his earlier period of incarceration would show two disciplinary matters. One was for making gambling dice from paper and soap. The other was for fighting a bullying inmate named "Cadillac." Applicant recalled that he had been in the day room talking to an inmate who was known as an easy rape victim. When Cadillac began taunting both of them, a fight ensued. Applicant said that a guard who witnessed the incident corroborated his assertion of self-defense.

Jemma Levinson interviewed applicant twice in May 2000. According to her notes, applicant stated that he looked after his older brother, Charles, who sometimes got into trouble when drinking, and that he broke up fights between Charles and their brother Jessie. Applicant also said that it fell to him and his sister, Clara Jean, to look after the younger siblings. At school, applicant's sister, Colleen, told him that a boy was bothering her.[30] Applicant told the boy to leave Colleen alone and fought with him.

Applicant described himself to Levinson as the kid in the neighborhood that everyone liked and recalled that he would clean houses and cut yards. Applicant told Levinson that, when he was around eleven or twelve years old, he would sneak out of the house between 1:00 and 2:00 a.m. to see friends. Applicant said that he lacked guidance and became attracted to "things on the street."

---

[30] This is the same Colleen McNeese who testified at the 1993 evidentiary hearing and the 2001 punishment

Applicant also stated that he did not do well in school, did not like it, and was frustrated by his inability to read or write. To escape class, at first he would go to the school nurse, pretending to be sick. He started skipping school in fourth grade, skipped school a few times in sixth grade, and by seventh grade, almost entirely stopped going. Applicant told Levinson that he also started drinking in the seventh grade.

Applicant reported that, in seventh grade, he wanted to be a football or baseball player and tried out for school sports teams, but he had to stop playing when he ran over a wire hanger while mowing lawns and suffered a cut to his leg. The hospital put a cast on his leg, which he ultimately removed himself because he was determined to walk on his leg. Applicant said that he met his first girlfriend at school and that he would sneak from his house at night to see her. Applicant stated that he got into trouble at school for fighting and had a reputation for it, such that people wanted to fight with him. Applicant thought that the fights came about because he was shy and did not know how to communicate.

Applicant also told Levinson that he began hanging around the pool hall, where he learned to gamble and steal. Another guy around his same age showed him how to shoot pool, rob people, steal cars, and break into houses. Applicant told Levinson that he later began doing those things on his own.

Applicant further stated that he started injecting preludes when he was between fifteen and sixteen years old, but he later stopped because it scared him, and he knew that he would end up dead or doing something that he would regret. Applicant also stopped drinking alcohol after seeing the effect it had on him, but he continued smoking marijuana.

Applicant reported that he paid for drugs with money that he made from stealing and selling cars, breaking into houses, and hustling pool.

Applicant also told Levinson that during his earlier period of incarceration, he made friends with an inmate named Swan. Applicant and Swan would stay out of the day room to avoid the fights that frequently occurred there. Instead, he and Swan would play dominoes elsewhere and applicant had a disciplinary report for one of those occasions. Applicant recalled that, around 1997, he went through "a bad period" on death row, during which all he did was sleep and gain weight. Applicant further told Levinson that he had ordered and read a book written by a jail officer.

The notes contained in applicant's Factual Supplement indicate that Moran and Levinson separately interviewed Clara Jean Baker in 2000. According to those notes, Clara Jean reported that both of applicant's parents regularly beat all of the children except for her. Clara Jean recalled that, as applicant grew older, he would intervene when his parents fought, causing Junior to throw him out. Clara Jean said that applicant knew about Junior's many extramarital affairs and that Junior was always angry with applicant for catching him in infidelity. Clara Jean further stated that applicant and their brother, Jessie, would sneak out of the house. In his early years, applicant was quiet, shy, and did not spend much time with other people, but otherwise was happy, artistic, and always working. In summer, applicant would cut yards all day until Marion came home. Applicant liked wearing nice things and cared a lot about his appearance. Clara Jean recalled that applicant had a girlfriend at school named Robin, who

was "very cute," and other boys envied him because of it.

The notes also indicate that Levinson interviewed Larry Baker in 2000. Larry reported that, as a child, applicant was "personable and impressionable, . . . a very good athlete," liked animals, was obedient, attended school, and "was just the same as the rest of us." Applicant trained the Moore family's dog and put on "shows" with the animal. The dog was very well trained and did whatever applicant said. Larry recalled that applicant followed clothing trends, was pleasant and well-mannered, and was always helpful, doing odd jobs and selling newspapers. He described applicant as enterprising and having a lot of friends. As they grew older, Larry started noticing changes in applicant's choice of associates and in applicant's attitude towards attaining things. Larry stated that applicant developed the attitude that he did not want to work his whole life and have nothing. Larry told Levinson that applicant always looked neat and tidy, had good hygiene, and worked in a fish market and cut grass to buy his clothes.

D. Appointment of Mental-health Experts

The current habeas court appointed mental-health experts for both parties in anticipation of the 2014 evidentiary hearing. Dr. Borda again assisted applicant, as did Dr. Shawanda Williams Anderson, a clinical neuro-psychologist, and Dr. Stephen Greenspan, a retired professor of educational psychology. Dr. Kristi Compton, a clinical and forensic psychologist, assisted the State. Before the hearing, habeas counsel filed

Borda's affidavit and Anderson's "Forensic Neuropsychological Report."[31]

According to her report, on November 22, 2013, and December 6, 2013, over a period of four hours, Anderson conducted an initial diagnostic interview of applicant at TDCJ's Polunsky Unit and administered various neuropsychological tests to him. She thereafter interviewed applicant's family members for approximately two hours. On December 19, 2013, Anderson administered math subtests of the WAIS-IV and Wide Range Achievement Test-4 (WRAT-4) to applicant at the Harris County Jail, solely to determine his computational ability.

According to Borda's affidavit, he administered "a very limited test battery" to applicant on December 12, 2013. That battery consisted of three neuropsychological tests and one formal measure of IQ, a Raven's Colored Progressive Matrices (RCPM) test. Applicant obtained an IQ score of 85 on the RCPM.

On January 1, 2014, Compton conducted a six-hour assessment of applicant. After interviewing applicant about his personal history, she administered a Test of Memory Malingering (TOMM); a WAIS–IV; a Wechsler Memory Scales, 4th Edition; a complete WRAT-4; and a Texas Functional Living Scales, a test of adaptive functioning. Applicant obtained a full scale IQ score of 59 on the WAIS-IV.

E. January 2014 Evidentiary Hearing

Lonnie Moore, Colleen McNeese, Larry Baker, Mark Fronkiewicz, Borda, Greenspan, and Anderson testified for applicant at the 2014 evidentiary hearing.

---

[31] Although habeas counsel described Anderson's report as a sworn affidavit, the report is not sworn or notarized.

Through applicant's relatives, applicant again presented evidence of Junior's alcoholism and physical abuse, the family's limited financial means, and applicant's poor grades and reading difficulties.

Lonnie Moore testified that applicant was shy, quiet, and athletically talented as a child, especially at swimming, but he received poor grades in school and never read well. While still living with the family, applicant made money in the summer by cutting grass and helping a man with household projects. After being thrown out of the house, applicant worked at the Galleria for a place that sold sausages.

Lonnie and McNeese testified that their mother, Marion, cooked the family's meals on a hot plate and that the family did not have kitchen appliances such as a microwave oven. McNeese asserted that applicant did not know how to cook and did not help prepare food. However, McNeese and Lonnie both testified that only the female children were enlisted to help Marion with meal preparation.

McNeese had testified at applicant's 1993 evidentiary hearing and his 2001 punishment retrial. She now remembered that the incident on the school bus, in which applicant was hit in the head with a brick, was a much more violent event than she had described in her prior testimony, asserting that it involved the bus being set on fire with Malotov-cocktail-like devices. McNeese also now remembered that, when applicant was in second and third grade, he could not tell a $1 bill from a $5 or $10 bill, was not allowed to go places by himself because he did not know how much change he was supposed to receive, and that she had to accompany him and handle the money. But McNeese acknowledged that, after he learned to read, applicant was able to distinguish the

denominations on bills. McNeese also acknowledged that she had recently received letters from applicant and that his counting, reading, and writing ability had greatly improved since his imprisonment.

Through McNeese, habeas counsel attempted to show that Junior treated applicant more harshly than his siblings and that he did so because he perceived applicant to be intellectually disabled. Habeas counsel elicited testimony from McNeese that Junior was more cruel to applicant than to her other siblings. McNeese stated that Junior would call applicant "dumb," bend applicant's hand back, and whip him when applicant could not spell words or read on command. McNeese stated that Junior would get especially angry when school representatives visited the house to say that applicant needed help. McNeese testified that she was present when Junior "ran off" two such representatives, one of whom suggested that applicant was intellectually disabled and needed a different educational setting. But McNeese stated that, at the time, she did not think that applicant was intellectually disabled. She also testified that, while applicant was "left behind" in school, he was always in regular classrooms. In contrast to her 2001 testimony that applicant functioned better and participated more when he was at places like Hester House, where Junior "could[n't] . . . [mess] with him," McNeese now asserted that applicant functioned the same whether Junior was present or absent.

Contrary to his earlier statements, Larry Baker now remembered that applicant was the slowest kid in a group of neighborhood boys who played sports together and that the other boys teased applicant for being a "dummy" until Larry made them stop. Larry testified that, when they played football, applicant

could not follow verbal play instructions very well and that Larry had to diagram plays in the dirt for him. When they played baseball, he had to repeatedly tell applicant not to sling the bat. Larry also now remembered that people tried to take advantage of applicant, although he recalled that applicant would stand up for himself. Although Larry did not dispute his 2001 testimony concerning the advances applicant had made while in prison, he asserted that applicant's letters did not reflect a mature, thoughtful person with a normal state of mind.

Through the testimony of Mark Fronkiewicz, who acknowledged that he had an extensive criminal record and was on parole for murder at the time of the hearing, habeas counsel attempted to minimize the evidence of applicant's many *pro se* filings and other writings included in the record. Fronkiewicz testified that he spent 1988 to 1993 on death row, before inmates received appointed counsel, and he worked as a writ writer, assisting inmates with legal and personal correspondence and writ preparation. Fronkiewicz stated that he recognized applicant from death row, but had never talked to him. Fronkiewicz asserted that David Harris was another writ writer on death row when Fronkiewicz was there. Fronkiewicz said that Harris sought his assistance on a *pro se* writ that Harris was preparing for applicant. Fronkiewicz remembered discussing applicant's case with Harris, but could not recall the date.

Borda, who acknowledged in his 2013 affidavit that forensic psychology "is not [his] specialty," testified that he now concluded that applicant met the criteria for a intellectual-disability diagnosis.[32] In forming his

---

[32] In his 2013 affidavit, Borda acknowledged that, in 1993, he concluded that applicant's intellectual functioning fell within the

current opinion, Borda relied on: the records he reviewed in preparation for his 1993 evidentiary-hearing testimony; unspecified other medical records and affidavits provided by current writ counsel; unspecified other records, provided by unspecified other sources; "some family history"; Vitale's and Garnett's affidavits; Anderson's written report; the 2014 evidentiary hearing testimony of applicant's relatives; and his own "really . . . very, very brief" assessment of applicant in December 2013, which did not involve giving applicant "a [full scale] IQ test." Borda acknowledged that he did not know much about the offense and had not read applicant's confession or trial testimony. Borda asserted that Vitale, Garnett, and Anderson had also diagnosed applicant as intellectually disabled.

Greenspan testified that he had a practice related to diagnosing intellectual disability in the forensic setting and that he performed the vast majority of his work for defense attorneys. In the roughly fourteen years since the *Atkins* decision, he had actually performed 10 to 12 clinical evaluations for intellectual disability and diagnosed intellectual disability in about two-thirds of them. Greenspan further testified that his clinical evaluations are not comprehensive because he focuses on the adaptive-deficits criterion. Greenspan stated that he taught IQ courses many years ago, but when working in his clinical capacity, at most, he only occasionally administers an IQ

---

borderline range (an IQ of 70–79). But Borda asserted that he had since reviewed "extensive additional records." Borda also stated that the Flynn Effect was now widely accepted in the field of psychology and that the definition of intellectual disability had changed. Borda stated that these developments also contributed to his present opinion. *Id.*

screening test. When determining whether a defendant satisfies the sub-average intellectual-functioning criterion, Greenspan relies on IQ test scores in the defendant's records. If none exist, then he requests that someone who is "more current" with IQ testing conduct such testing.[33]

Greenspan stated that he was testifying in applicant's case as a teaching expert and acknowledged never having met or communicated with applicant. Greenspan also acknowledged that he had not read the transcript of either of applicant's two trials. Although Greenspan did not offer a diagnosis, he testified that he had no reason to doubt Borda's intellectual-disability diagnosis and saw no basis for any other diagnosis.[34]

---

[33] Greenspan acknowledged that, about a year before applicant's hearing, a federal judge issued an opinion in the Alexis Candelario Santana case, warning courts across the country to be cautious when reviewing Greenspan's testimony in future intellectual-disability cases. *See United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 203–06 (D.P.R. 2013) (finding Greenspan to be "completely lacking in credibility" and stating that due to "bias[]," "considerable careless errors and slipshod disregard for the seriousness of the [court's] inquiry," continued "combative[ness] and evasive[ness] despite being admonished to be more forthcoming with his answers," "unwilling[ness] or [inability] to explain evidence that tended to refute his conclusions[,] and . . little explanation . . as to why he thought the government's experts' assessments were incorrect," Greenspan's testimony in an *Atkins* evidentiary hearing "suffered from extreme deficits" such that it "was fundamentally unreliable" and should be disregarded).

[34] Applicant elicited no testimony concerning precisely what records Greenspan reviewed in preparation for his testimony. In response to State questioning, Greenspan mentioned that he had been given roughly 200 pages consisting of "all the different pleadings." Greenspan, however, acknowledged that he did not

Anderson testified that current writ counsel originally asked her to determine whether applicant was born with a brain anomaly ("organicity") or evidenced a traumatic brain injury (TBI). To make those two determinations, Anderson reviewed unspecified school and medical records that current writ counsel provided, conducted an initial diagnostic interview, and administered various neuropsychological tests. Anderson testified that the neuropsychological tests she gave were not IQ tests.

Anderson stated that applicant's scores on the tests she gave indicated language deficits, slowed processing speed (but an intact memory), and problems with reasoning and judgment. Anderson testified that applicant's verbal memory score fell in the low-average range, reflected a weakness in his ability to acquire words (versus the ability to recall them once learned), and implicated his capacity to learn. She stated that applicant's scores on the executive-functioning assessments she gave were all in the "severe" range.[35]

Anderson testified that, after she conveyed her findings on organicity and TBI to current writ counsel, he asked her to review the criteria for intellectual disability.[36] Anderson testified that she has made intellectual-disability determinations at least a few

---

review State's Exhibits 1–35, which were admitted into evidence before the beginning of Borda's testimony.

[35] Notably, Anderson stated in her report that applicant "reported that he used reading glasses for corrected vision, but did not have them at the time of testing. However, he reported being able to see all test stimuli accurately and without incident."

[36] At the hearing, Anderson did not state what conclusions she drew, if any, concerning whether applicant was born with a brain anomaly or suffered a TBI.

times in her practice. Anderson stated that, in making her intellectual-disability determination, she did not conduct any further evaluation except for a two-hour group interview of applicant's relatives. Anderson opined that applicant would meet the DSM-IV's and AAIDD's criteria for intellectual disability. [37]

Jerry LeBlanc and Compton testified for the State at the 2014 evidentiary hearing. LeBlanc testified that he had worked at the Polunsky Unit's commissary for fourteen years and and personally dealt with the commissary on a daily basis. LeBlanc explained the procedure by which death-row inmates request commissary items, described the kind of mathematical computations required to successfully complete a commissary form, and described his interactions with applicant regarding commissary transactions. \

---

[37] In her report, Anderson stated:

> It seems [applicant] exhibited developmental and intellectual delays early in his life that were significant enough for him to require consistent monitoring and elicit help from his teachers. These deficits were demonstrated much prior to age 18, which would satisfy criteria for a formal diagnosis of [intellectual disability]. Adaptively, he had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition. . .
>
> Taking into account the records reviewed, prior intelligence test findings, and [applicant's] performance on more stratified and task-specific neuropsychological tests, he more likely than not meets full criteria for [intellectual disability]; and this clinician would be justified in assigning said diagnosis.

While looking at applicant's commissary records, LeBlanc testified to specific, recent examples of applicant having correctly computed multiple-unit order totals and having composed orders that came within 5¢ of the $85 limit. In one example, applicant used his funds to purchase fifteen postage stamps. LeBlanc also noted two examples of applicant having requested substitute items (one being a request for aspirin or dental floss in place of ibuprofen). LeBlanc testified that he did not help applicant complete commissary forms, and to his knowledge, no one else did. LeBlanc asserted that the commissary's price list changed frequently and that, although there was another cell adjacent to applicant's, the unit moved death-row inmates frequently, and thus, applicant did not have the same neighbor for significant periods.

LeBlanc additionally testified about his interactions with applicant regarding commissary transactions. LeBlanc stated that he and applicant had discussed what the commissary carried and whether it had correctly filled applicant's order. When the commissary had charged applicant for undelivered or damaged items, applicant had noticed, brought it to LeBlanc's attention, and been able to discuss the discrepancy or damage. LeBlanc had never received the impression that applicant was unable to understand what was going on with his commissary order or that he was unable to respond to LeBlanc's questions.

Compton stated that she had testified as an expert over seventy times and had conducted over 3,000 forensic evaluations, with about 50% of her work having been directly for the courts, 40% for defense attorneys, and 10% for the State. In preparation for her testimony, Compton reviewed applicant's school

records; past psychological testing results; TDCJ records (including commissary and disciplinary records); transcripts from applicant's 1980 trial (including applicant's testimony), 1983 *Faretta* hearing, and 2001 punishment retrial (including Halpin and Wright's expert testimony); letters from applicant to his attorney and others; motions filed by applicant; and recent photographs of items inside applicant's cell. Compton also personally assessed applicant by interviewing him and administering standardized tests, including effort tests. Compton additionally attended the entire evidentiary hearing and listened to the other witnesses' testimony.

Compton testified that the data she reviewed did not support an intellectual-disability diagnosis. Based on applicant's Flynn-Effect-adjusted scores on IQ tests that she considered valid, Compton concluded that there was a greater probability than not that applicant's intellectual functioning fell within the borderline range. But Compton noted that, when the standard error of measurement was applied to the mean of his valid, Flynn-Effect-adjusted IQ scores, the lower end of the scoring range could dip into the mild intellectual-disability range. Nevertheless, Compton opined that applicant's level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis.

After receiving the habeas court's findings of fact and conclusions of law recommending that we grant relief on applicant's *Atkins* claim, we filed and set the case to consider that allegation.

III. Analysis

To prevail on the allegation that he is intellectually disabled for Eighth Amendment purposes and,

therefore, exempt from execution, applicant must prove by a preponderance of the evidence that (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an IQ of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by significant and related limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen. *See Cathey*, 451 S.W.3d at 9; *Sosa*, 364 S.W.3d at 894; *Briseno*, 135 S.W.3d at 7.

A. Significantly Sub-average General Intellectual Functioning

Applicant has failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning. The IQ scores before us are: a 77 IQ score obtained by applicant in 1971 (age 12) on the OLMAT; a 57 IQ score obtained in 1972 (age 13) on the Slosson; a 78 IQ score obtained in 1973 (age 13) on the WISC; an estimated full scale IQ score of 71 obtained in 1984 (age 30) on an abbreviated WAIS-R; a 74 IQ score obtained in 1989 (age thirty) on a complete WAIS-R;[38] an 85 IQ score obtained in 2013

---

[38] There appears to be an uncorrected scoring error associated with the 1989 WAIS-R. A raw score of 7 appears on the Digit Span subtest. Per the scoring table, the corresponding scaled score should be 4, but the test administrator wrote 5. At the 2014 evidentiary hearing, applicant offered no testimony about a scoring error or its effect on the reported IQ score of 74. In Addendum Finding 112, the habeas court noted the scoring error and stated, "The correction of this error means that the scaled score for Verbal Tests is now 32, rather than 33. With reference to the WAIS-R manual, the accurate full scale score should actually be one point lower, which equates to a [full scale] IQ score of 73."

There was no testimony at the 2014 evidentiary hearing about the WAIS-R manual, nor was the WAIS-R manual admitted into

(age 54) on the RCPM administered by Dr. Borda; and a 59 IQ score obtained in 2014 (age 54) on the WAIS-IV administered by Dr. Compton. Applicant also asks us to rely on the IQ scores that Borda and Garnett derived from the mental-age scores that he obtained in 1973 (age 13) on the Bender Gestalt and Goodenough tests administered by Marcelle Tucker.

At the 2014 evidentiary hearing, Borda identified the 57 IQ score on the Slosson as the first and most accurate assessment of applicant's IQ[39]. Borda reached that conclusion because, due to "practice effects in IQ testing, usually the most accurate assessment is the first test that's done."[40] He also cited applicant's lack of incentive to do poorly. Borda initially acknowledged that, like the RCPM, the Slosson is a group-administered test and not one that is widely used. On further redirect examination, Borda asserted that, like the RCPM, the Slosson could also be individually administered, but he acknowledged that the Slosson was not a test that he would use.

---

evidence at the hearing or filed with the habeas court. Thus, the record does not support the habeas court's finding that applicant's WAIS-R score was actually 73 rather than 74. But even if we were to assume that applicant's WAIS-R score was actually 73, it does not change our determination that he has failed to prove significantly sub-average general intellectual functioning.

[39] In his affidavit, Borda acknowledged that applicant took the OLMAT in 1971, but asserted that the OLMAT is "a test used primarily to assess academic needs and is not accepted as an instrument appropriate for the assessment of [intellectual disability]."

[40] The AAIDD states that the "practice effect" refers "to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument." INTELLECTUAL DISABILITY 38.

Borda discounted applicant's 78 IQ score on the WISC. First, Borda asserted that applicant's WISC score should be adjusted to 70 for the Flynn Effect. Second, Borda noted that applicant contemporaneously took Bender Gestalt and Goodenough tests. Although he acknowledged that the Bender Gestalt and Goodenough tests are not IQ tests, Borda explained that he used applicant's mental-age scores on those instruments to derive IQ scores. Borda stated that he calculated an IQ score of 67 on the Bender Gestalt and an unspecified IQ score on the Goodenough. He then adjusted both derived scores for the Flynn Effect, arriving at a 56 IQ for the Bender Gestalt and a "mid-60s" IQ score for the Goodenough. Borda testified that the derived, Flynn-Effect-adjusted IQ scores on the Bender Gestalt and Goodenough tests indicated that the WISC score overstated applicant's level of intellectual functioning.

Borda also discounted applicant's 74 IQ score on the 1989 WAIS-R, asserting that it should be adjusted to 71 for the Flynn Effect. [41] Borda asserted that applicant's 85 IQ score on the RCPM could be artificially high due to the practice effect because the RCPM is very similar to the matrices portion of the Wechsler Scale IQ tests. But Borda acknowledged that, when he gave the RCPM, applicant had not been subjected to any meaningful IQ testing for over a decade. Borda also acknowledged that the AAIDD is the commonly accepted national authority on intellectual disability and that, per the AAIDD, the practice effect is nonexistent after seven years.

---

[41] In response to a question that apparently referred to Compton's WAIS-IV testing, Borda acknowledged that applicant's IQ had been tested more recently, but stated that he had not reviewed those results.

Borda acknowledged that he did not conduct effort testing when he assessed applicant. Borda asserted that no good effort test exists for people with below-average IQs because most such tools gauge memory; therefore, people with memory problems will not score well on them. He also testified that effort tests are not normed for the below-average IQ population. Borda further asserted that, for a person with as much experience as he possessed, any malingering would be obvious from simple observation. But Borda denied taking the position in his testimony that effort testing is inapplicable to intellectually disabled people.

Borda agreed that applicant had a difficult childhood, describing it as "a horrible background" in which "a very authoritarian father" created "a very dependent" and "fearful" child. Although he acknowledged that applicant's childhood environment did not help his intellectual development, Borda asserted that applicant was "very limited" to begin with. Borda acknowledged that a learning disability is not the same as intellectual disability and that emotional disturbances (including depression) and environmental conditions (including living in an abusive household or having parents who are not intellectually curious) can adversely affect a person's learning ability and IQ scores. Borda also acknowledged that facing the death penalty could adversely affect motivation or cause depression and negatively affect test performance.

Borda acknowledged that others testified that applicant had done well and improved his academic skills while on death row. However, Borda did not find this testimony persuasive. Borda concluded that applicant was able to develop these skills on death row

because he had abundant time to practice very specific and essentially unchanging tasks.

Greenspan disregarded applicant's 77 IQ score on the OLMAT, asserting that the OLMAT is a group-administered test. He stated that group-administered tests are not comprehensive and do not yield a full-scale measure of intelligence. Greenspan also discounted applicant's 57 IQ score on the Slosson. Greenspan testified that, while the Slosson could be individually administered, it is a screening test that is not as comprehensive as the WISC and it is not considered a gold-standard test for diagnostic purposes. Greenspan also stated that the version of the Slosson test given to applicant derived IQ scores by the unreliable and now-abandoned ratio method that compared chronological and mental age. He testified that the Slosson is now scored using the more valid statistical-deviation method. Greenspan further indicated that the degree of statistical deviation from the mean is the currently accepted method of evaluating an individual's intellectual functioning.

Greenspan testified that the Wechsler scale is considered the gold standard. But Greenspan testified that applicant's 78 IQ score on the WISC should be reduced for the Flynn Effect to below 70, if applicant took the original WISC, or to between 70 and 71, if applicant took the WISC-R. Greenspan testified that, even without correcting for the Flynn Effect, the standard error of measurement (SEM) meant that applicant's WISC score could have been as low as 73. But Greenspan also volunteered that the score obtained on the WISC by someone who, like applicant, came from a poor, African-American family could underestimate the actual level of intellectual functioning.

Greenspan testified that the WAIS-IV is the current gold standard for IQ tests, and he emphasized that applicant obtained an IQ score of 59 on the WAIS-IV that Dr. Compton had recently administered. Although he had earlier testified that applicant's Slosson score was unreliable, Greenspan emphasized that applicant's WAIS-IV score was almost identical to applicant's Slosson score.[42]

On direct examination, Greenspan testified that the validity of effort tests for people in the intellectually disabled range had not been adequately established. Greenspan asserted that the two best indicators of effort for intellectually disabled people are (1) the clinical judgment of an experienced evaluator; and (2) whether current test results are congruent with past test results, especially on tests given when the subject had no incentive to do poorly. Based on the testimony given at the 2014 evidentiary hearing by applicant's relatives, Greenspan concluded that a lack of ability was a more likely explanation for applicant's poor test scores than a lack of good effort.

On cross-examination, however, Greenspan acknowledged that the recommended practice in forensic psychology is to conduct effort testing, especially when one is administering cognitive measures. Greenspan denied taking the position, on direct examination, that effort testing is less applicable to someone with intellectual disability. He clarified that the results of effort tests given to intellectually disabled people are more difficult to interpret, because of problems validating effort tests for low IQ individuals. Greenspan agreed that it is

---

[42] Neither party elicited testimony from Greenspan regarding applicant's 85 IQ score on the RCPM given by Borda.

important to analyze the results of IQ testing to ensure validity, especially when an external motive to exaggerate symptoms might exist. Greenspan also agreed that, for many people, facing the death penalty would be a significant external motivating factor. Greenspan volunteered that "there are all kinds of reasons why someone would give a poor effort and one of them is if you have a history of failure in academic settings[;] you might go too quickly or you might not give optimal effort because you just assume it's not going to make any difference."

Anderson did not administer any IQ testing when she examined applicant. She did not testify about the reliability of any particular IQ test or IQ score reflected in the record.[43] She acknowledged that factors unrelated to a person's actual mental ability can lower test scores, including depression, psychosis, and external motivations to obtain a lower score, such as facing the death penalty.[44]

Compton disregarded applicant's OLMAT and Slosson scores, stating that those instruments were

---

[43] Anderson's report contains a paragraph discussing some of applicant's IQ test scores, identifying the IQ test by the year of administration. The record does not support Anderson's representation of applicant's IQ scores, including her assertion that, in 1989, applicant obtained "a full scale IQ of 71" which "did not deviate much from prior scores." The record before us indicates that the only IQ score of 71 that applicant obtained was an estimated full scale IQ score of 71 on an abbreviated WAIS-R administered to him by TDCJ in 1984. Anderson appears to challenge the validity of applicant's IQ scores on the 1973 WISC (78 IQ) and 1989 WAIS-R (74 IQ), but the basis for her criticism is unclear.

[44] The MMPI administered by TDCJ in 1984 concurrently with the abbreviated WAIS-R revealed elevations on the psychotic scales and a significant probability of psychiatric disturbance.

group tests and lacked high validity. Compton indicated that applicant's 1972 Slosson score was particularly problematic due to research suggesting that, in the 1970s, the Slosson had extremely poor validity in determining intellectual disability. Compton also disregarded the Bender Gestalt and Goodenough tests because they were neuropsychological screening instruments rather than IQ tests.

Compton testified that applicant's 78 IQ score on the WISC was the most reliable IQ score reflected in his records because it was the first and only full scale, individually administered IQ test given during the developmental period. Compton stated that, because she could not tell whether applicant took the original WISC or the WISC-R, she made alternative Flynn Effect adjustments to his reported score: 69 to 70 IQ, assuming that applicant took the original WISC, and 73 to 74 IQ, assuming that he took the WISC-R. Compton noted that applicant's IQ might be higher than his Flynn-Effect-adjusted WISC score because family reports suggested that he was traumatized as a child by paternal abuse. Compton explained that childhood trauma can cause low IQ scores because the stressful environment makes it difficult for the child to get enough rest, focus, and learn.

Compton, who testified that she had worked in a prison system, doubted the validity of applicant's IQ scores on TDCJ-administered tests because prison IQ assessments do not typically include effort testing. Compton asserted that effort testing is important when assessing cognitive deficits because, if the subject is not exerting effort, the assessment will inaccurately represent his ability.

Compton also stated that many inmates are depressed and that depression can lower IQ scores. Although TDCJ never formally diagnosed applicant with depression, he exhibited withdrawn and depressive behavior throughout his time on death row, and he demonstrated similar behavior earlier in his life. Compton also noted a 2005 TDCJ report stating that applicant wrote a suicide note, although the report indicated that applicant denied having written it.[45] Compton testified that applicant's affect was flat during her evaluation and he seemed a little depressed. Although he denied being currently depressed, applicant admitted that he had experienced some depression in the past. And while applicant was not formally diagnosed with depression during his schooling, school officials twice recognized that he was experiencing emotional disturbances.

Compton did not consider applicant's 59 IQ score on the WAIS-IV that she administered to be valid due to persistent indicators throughout her assessment that applicant was exerting suboptimal effort.[46] After interviewing him about his personal history, Compton gave applicant the Test of Memory Malingering (TOMM), an effort test. Compton testified that applicant's results suggested that he was not exerting full effort, even when she gave him the benefit of the doubt by assuming that he was intellectually disabled and applying only the specific norms for intellectually

---

[45] The record shows that 2005 is the same year in which applicant wrote a letter to the habeas court, asking the court to allow him to withdraw his appeals and to set his execution date, and later filed a *pro se* motion requesting the same relief.

[46] Compton testified that she adjusted applicant's WAIS-IV score to 57 to account for the Flynn Effect.

disabled individuals.[47] When Compton subsequently administered the WAIS-IV, applicant obtained a full scale IQ score that was significantly lower than she had expected.[48] Further, Compton stated, her analysis of applicant's WAIS-IV results revealed pervasive internal discrepancies that indicated suboptimal performance.

Compton testified that her analysis of applicant's WAIS-IV results also revealed a significant discrepancy between the crystallized knowledge that applicant had demonstrated in 1989 intelligence testing and what he currently professed to know. When Compton asked applicant what a thermometer was, he told her that he did not know, although he had answered the same question correctly when an examiner had asked it in 1989. Compton stated that it was rare to simply forget the meaning of a previously known word and noted that both her own and Dr.

---

[47] Compton disagreed that it was inappropriate to give effort tests to intellectually disabled individuals. She also testified that, according to the primary research, the TOMM has good reliability when administered to intellectually disabled people. Compton also assessed applicant's effort through embedded measures in the IQ and memory tests she administered. She stressed that, contrary to the assertions of applicant's experts, these embedded measures were normed on intellectually disabled people. And to give applicant the greatest benefit of the doubt, Compton did not compare his scores to the overall clinical sample when interpreting his results on the embedded effort measures. Instead, Compton compared applicant's scores to the norms for individuals who were known to be intellectually disabled, those for individuals with traumatic brain injuries (TBIs), those for people with only eighth-grade educations, and those for people of different ethnicities and cultures.

[48] Compton testified that she had expected applicant to obtain a full scale IQ score in the 70s, based on what she had seen, applicant's history, and his education level.

Anderson's testing had placed applicant's memory in the low-average range. When Compton checked the validity of her WAIS-IV testing with additional effort testing, the results (lower than expected scores and indications of suboptimal effort) were very similar to applicant's WAIS-IV results.

The record does not support considering applicant's IQ scores on the OLMAT, Slosson, 1984 abbreviated WAIS-R, 2013 RCPM, or derived IQ scores on the Bender Gestalt and Goodenough tests given in 1973, because of the evidence that these instruments were noncomprehensive screening or group IQ tests, neuropsychological tests rather than IQ tests, or derived IQ scores using the ratio method and concept of mental age rather than the degree of statistical deviation from the mean.[49] The record additionally does not support considering applicant's IQ score on the WAIS-IV, given the compelling evidence of his suboptimal effort on that instrument. We are left with applicant's 78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989.

---

[49] According to the AAIDD,

> It is important to note that IQ scores derived from an intelligence test are now developed on the basis of a deviation (from the mean) score and not on the older conception of mental age. Thus, in reference to the significant limitations in intellectual functioning criterion for a diagnosis of [intellectual disability], a valid diagnosis of [intellectual disability] is based on how far the person's score deviates from the mean on the respective standardized assessment instrument and not on the ratio of mental age to chronological age.

INTELLECTUAL DISABILITY 35; *see also Penry*, 492 U.S. at 339–40 (O'Connor, J.) (noting that the "mental-age" concept is problematic in several respects).

Taking into account the standard error of measurement, applicant's score range on the WISC is between 73 and 83. The fact that applicant took a now-outmoded version of the WISC in 1973 might tend to place his actual IQ score in a somewhat lower portion of that 73 to 83 range. *See Cathey*, 451 S.W.3d at 18. However, the evidence that applicant was traumatized by paternal violence, was referred for testing due to withdrawn behavior, came from an impoverished and minority cultural background, and started to abuse drugs by the time of testing might tend to place his actual IQ in a somewhat higher portion of that 73–83 range. *Cf. id.* "Taken altogether, there is no reason to think that applicant's obtained IQ score" of 78 on the WISC "is inaccurate or does not fairly represent his borderline intelligence during the developmental stage." *Id.*

The score that applicant obtained on the 1989 WAIS-R supports the conclusion that his WISC score accurately and fairly represented his intellectual functioning during the developmental period.[50] Applicant's score range on the WAIS-R is between 69 and 79. As with the WISC, the fact that applicant took a now-outmoded version of the WAIS-R might tend to place his actual IQ score in a somewhat lower portion

---

[50] In Addendum Findings 111 and 113, the habeas court asserted that applicant's score on the 1989 WAIS-R was likely affected by the practice effect because he was given an abbreviated WAIS-R the previous day. The findings are not supported by the record, which shows that, on January 26, 1989, TDCJ psychologist James Majors gave applicant the Vocabulary and Block Design subtests of the WAIS-R. On the following day, January 27, 1989, Majors administered the WAIS-R's remaining subtests. As such, the record does not support a finding that there was a duplication of subtests within a short period of time that resulted in an artificially high score on the 1984 WAIS-R.

of that 69 to 79 range. *See id.* However, by the time he took the WAIS-R, applicant had a history of academic failure, something that his own expert stated could adversely affect effort. Applicant also took the WAIS-R under adverse circumstances; he was on death row and facing the prospect of execution, and he had exhibited withdrawn and depressive behavior. These considerations might tend to place his actual IQ in a somewhat higher portion of that 69 to 79 range. *Cf. id.* Considering these factors together, we find no reason to doubt that applicant's WAIS-R score accurately and fairly represented his intellectual functioning as being above the intellectually disabled range. *See id.*

B. Significant, Related Deficits in Adaptive Behavior

Even if applicant had proven that he suffers from significantly sub-average general intellectual functioning, his *Atkins* claim fails because he has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning.

At the 2014 evidentiary hearing, Borda defined adaptive functioning as the ability to successfully do everyday things on one's own. But Borda also asserted that adaptive functioning describes a concept that is more complicated than being able to perform a certain specific task, such as balancing a checkbook. He characterized adaptive functioning as neuro-psychological or executive frontal-lobe functioning, such as the ability to make a decision, implement the decision, assess whether one is getting to a correct solution, and if not, to modify his behavior.

On direct examination, Borda agreed with habeas counsel's statement that applicant's family history

indicated that applicant had "strong" problems adapting, as to social behaviors and the academic realm. But Borda gave no more specific testimony about deficits in adaptive behavior. [51] On cross-examination and redirect, Borda acknowledged that standardized measures of adaptive functioning exist, that many adolescents with poor adaptive skills—for example, homeless teenagers—are not intellectually disabled, and that just because someone lacks certain skills does not mean that the person is intellectually disabled. Borda also acknowledged that applicant had adaptive skills during the developmental period, but opined that they were probably below average for someone of his age.

The State asked Borda whether evidence that applicant mowed grass for money and hustled pool suggested that he had money skills, knowledge that he needed to earn money, and the self-direction to obtain a job to make it. Borda suggested that he did not have sufficient information to render an opinion because he did not know whether applicant had independently thought of these ways to make money. Borda initially suggested that the offense facts did not indicate that applicant possessed adaptive skills, due to Borda's impression that others dragged applicant into it, that applicant went along because he was afraid to say no, and that no particular planning went into the offense. Borda stated that intellectually disabled people are

---

[51] To the extent that, in his affidavit, Borda identified certain "marked" or "severe" deficits in applicant's adaptive behavior, the record does not support several of his factual assertions. In addition, Borda did not contend in his affidavit that the deficits he identified were related to significantly sub-average general intellectual functioning. In any event, the record does not support such a conclusion.

suggestible and, if told to do something, they will do it. But Borda acknowledged that he did not know much about the offense and had not read applicant's confession or trial testimony.

Greenspan testified that, for purposes of diagnosing intellectual disability, "adaptive functioning" concerns how one functions in the world. He stated that adaptive functioning is not the same as executive functioning, which is a cognitive measure that looks at certain underlying reasoning skills. On direct examination, Greenspan asserted that he saw no evidence of applicant's competence in any of the adaptive behavior areas. On cross-examination, Greenspan acknowledged that applicant had areas "of greater ability," but asserted that they did not exclude an intellectual-disability diagnosis. Although Greenspan stated that he was generally familiar with the facts of applicant's offense, he acknowledged that he had not read the transcript of either of applicant's two trials.

Greenspan testified that the Texas Independent Living Scale (TILS) given to applicant by Dr. Compton is a standardized test that is generally accepted within the psychological community and considered a direct measure of adaptive behavior. He emphasized that applicant scored two-and-a-half standard deviations below the mean on the TILS.

Greenspan minimized the evidence that applicant had learned to survive on the street and in prison. Despite his earlier definition of adaptive behavior, Greenspan asserted that applicant's ability to function in prison and street environments did not necessarily reflect "adaptive" behavior, as that term is understood by the psychological community. Greenspan did not think that any of applicant's performance on the

following activities evidenced adaptive skills: (1) in preparation for his new punishment trial, consulting with counsel about whether to inform the jury that he had been on death row; (2) concealing a shotgun in a shopping bag when entering a store to rob it; (3) attempting to conceal his appearance during the offense by wearing a wig and sunglasses, and after the offense, changing his appearance by shaving his head; (4) arguing with accomplices over how to divide the proceeds of the crime; (5) deciding to stipulate that he had prior criminal convictions and responding appropriately to questioning by the court to determine whether the stipulation was voluntary, knowing, and intelligent; (6) writing four letters to his appellate lawyer that escalated from, "When are you going to file my appeal?," to "I object to you getting any extensions" to "Why won't you respond to any of my letters?" to "I object to you being my lawyer from this point forward"; (6) hustling pool; and (7) working as a barber and a porter in prison.

Anderson testified that she conducted a group interview of applicant's relatives to determine whether applicant had any longstanding, chronic deficits. From applicant's relatives, Anderson learned that he had unspecified deficits that were seen early and reported by his school. Applicant's relatives also told Anderson that he was never left alone, someone had to "hold his hand," and he needed help with his homework.[52]

---

[52] In her report, Anderson stated that, during the developmental period, applicant "had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which fall primarily under socialization, communication, and cognition."

Anderson acknowledged that, if a person donned a wig before entering a business to commit robbery, it indicated some forethought and planning, but she could not say whether the behavior showed an ability to protect one's self-interest. Anderson had no opinion on whether walking into the business with a shotgun concealed in shopping bags demonstrated an ability to plan ahead and protect one's self-interest. Anderson testified that committing a crime and then fleeing to another city did not necessarily demonstrate the ability to form and execute a plan for self-preservation. Anderson denied seeing evidence that applicant had excelled in any way since being imprisoned.

Compton stated that adaptive functioning examines everyday social, practical, and conceptual skills. She testified that she gave applicant a TILS test and acknowledged that applicant's TILS score fell two-and-a-half standard deviations below the mean. But Compton explained that the TILS score was not an accurate representation of applicant's abilities because she had to assign zeroes to questions asking about areas to which applicant had no exposure, such as writing a check and using a microwave oven.

When Compton gave applicant a complete WRAT-4, a test of academic abilities, his results fell within the second-grade level for mathematical skills and the third-grade level for reading comprehension and writing skills. Compton noted that applicant's writing ability scores on the WRAT-4 were inconsistent with the seventh-grade level ability he had demonstrated in letters he had written to friends. Compton testified that applicant's performance on the WRAT-4 math subtest was also internally inconsistent. Although applicant was able to perform advanced math at certain times, at other times, he missed very simple

questions. Applicant's performance on the WRAT-4 math subtest was also inconsistent with abilities he had demonstrated elsewhere, including in his commissary records. Compton testified that these inconsistencies increased the probability that applicant was not exerting full effort on the WRAT-4 math subtest.

Compton testified that she found some limitations in applicant's academic skills and some adaptive deficits in social interaction during the developmental period, but she also saw evidence of adaptive skills. For example, she saw evidence that applicant had lived in the back of a pool hall, as well as evidence that he had played pool and mowed lawns for money. Compton said that living on the streets in itself required applicant to engage in adaptive behavior. She opined that playing pool and mowing lawns showed some ability to understand money and work concepts.

Compton also saw evidence that applicant possessed adaptive skills at the time of the offense and original trial. Applicant's behavior surrounding the crime (wearing a wig, covering up the gun, and fleeing to Louisiana) all indicated planning, forethought, and an appreciation of the need to do something to avoid apprehension, which also related to his ability to engage in abstract thinking.

Compton added that applicant's 1980 trial testimony indicated that he had some ability to engage in abstract reasoning because he was able to conceptualize what his counsel and the State were asking and to form appropriate and exculpatory answers. Compton noted that applicant withstood both direct and cross examination and he testified in a coherent fashion. Compton stated that testifying and undergoing cross examination is a stressful experience

for most people. Applicant's 1980 trial testimony also showed that he was able to process and respond to questions without significant difficulty even under stressful conditions. Applicant's testimony showed that he could conceptualize the process and form exculpatory responses and alternative explanations, which further indicated an ability to process and manipulate information and form a response. Compton acknowledged that defense counsel may have prepared applicant for his 1980 trial testimony, but she noted that applicant had not had a lawyer to coach him for his 1983 *Faretta* hearing, at which he represented himself. Applicant had been able to understand what the trial court was asking him at the *Faretta* hearing and had responded appropriately, although he had difficulty with some of the legal issues.

Compton also saw evidence that applicant had developed adaptive skills in prison. In addition to representing himself at the 1983 *Faretta* hearing, applicant had learned to read and write in prison. His personal, handwritten correspondence demonstrated a seventh-grade writing ability. Compton indicated that applicant's writing ability could exceed a seventh-grade level if he also wrote the various handwritten and typewritten *pro se* motions presented at the evidentiary hearing. Regarding the handwritten *pro se* motions, Compton observed that the handwriting was very similar to the handwriting that she had seen throughout her review of applicant's case. Regarding the typewritten documents, Compton testified that applicant told her that he did not know how to type and that she had been told that he did not own a

typewriter.[53] Compton also acknowledged that inmates share pleadings and that Fronciewiz had testified that inmate David Harris had worked for applicant at one time.[54] But Compton testified that simply being involved in the process by copying the motions by hand would indicate understanding and require the ability to write. Compton opined that copying a legal motion would be something within the realm of only a few intellectually disabled people.

Compton found additional evidence of adaptive skills in applicant's TDCJ records. She testified that a disciplinary report stated that another inmate had been in applicant's cell to play dominoes. Compton opined that this indicated that applicant possessed social interaction skills and the ability to count because the game of dominoes required that skill.[55]

---

[53] It is unclear from the record who told Compton that applicant did not own a typewriter. Regardless of the source of this information, applicant's TDCJ records filed with the habeas court include a property receipt from the commissary. The receipt, which is dated March 11, 1993, and bears applicant's name, is for an electronic word-processor.

[54] We note that Harris was not convicted of capital murder until April 29, 1986, and was executed in June 2004. *See Ex parte Harris*, 136 S.W.3d 669 (Tex. Crim. App. 2004). Although applicant's TDCJ records show requests for legal visits with other inmates, the earliest such request is dated May 21, 2002. The earliest request for a legal visit with Harris, in particular, is dated June 29, 2002. The latest request for a legal visit with Harris is dated April 20, 2004. Accordingly, it does not appear that Harris could have assisted applicant with his *pro se* filings received by this Court and the trial court between October 1980 and July 1983.

[55] On cross-examination, Compton acknowledged that the disciplinary report did not show that applicant agreed about why the inmate was present and that the reporting officer did not state that he actually saw applicant playing dominoes. But

Compton noted that applicant's TDCJ classification file included a letter and questionnaire from TDCJ to the manager of Two-K restaurant, where applicant had previously worked. Compton agreed that the manager's responses showed that applicant could function in the capacity for which he had been hired. Regarding disciplinary problems, the manager had written that applicant was "capable of influencing others to dissent [and] like[d] confrontation." Compton testified that the comment evidenced applicant's conceptual and leadership skills.

Compton agreed that applicant's classification file also included a Social Summary, dated December 1, 1983, in which applicant had cited the advice of counsel and declined to discuss his offense. Compton stated that the fact that applicant declined questioning on the advice of counsel showed that he had the ability to understand instruction, conceptualize it, and act on it. Compton testified that incidents documented in applicant's death-row disciplinary records demonstrated his ability to form the intent to influence other people and to act on it, which fell within the social-skills domain, and the ability to stand up to authority, which was inconsistent with suggestibility and gullibility.

Compton also found evidence of adaptive skills in items that had recently been found in applicant's cell. Compton stated that a packet of handwritten letters, which were all in the same handwriting, had a seventh-grade-level readability score. She testified that a composition notebook found in applicant's cell

---

Jemma Levinson's notes of her May 25, 2000 interview with applicant, offered in his Factual Supplement, show that applicant told Levinson that he played dominoes with another inmate, and he referred to a disciplinary incident stemming from this activity.

contained the same handwriting throughout it. Although Compton acknowledged that applicant might have copied some of the notebook's contents from other sources, she indicated that other parts might have been the product of applicant's independent thought. The composition book contained a handwritten table matching the Wechsler Scales's normal distribution of IQ scores, which suggested to Compton that applicant was investigating IQ scores from his prison cell.

Compton agreed that books, a newspaper, and newspaper articles were found in applicant's cell. Each of the books, which included copies of the Qur'an and Know Your Islam, had applicant's name, inmate identification number, and a date written inside the cover. One of the articles concerned winning an appeal. Many of the books and newspaper articles found in applicant's cell contained underlining. Compton testified that an underlined passage could indicate that a person is reading and comprehending the underlined text. Although Compton acknowledged that people sometimes also underline passages that they do not fully understand, she testified that the action of underlining indicates the person's desire to return to the passage and review it, and thus still involves processing and conceptualization. Compton also stated that even if a person underlines passages because he does not understand them, the act implies that he has understood the surrounding text.

Other items found in applicant's cell included heavily notated calendars for the years 2012 through 2014. Compton testified that notations on the calendars indicated that applicant understood the concept of months, an understanding that he also demonstrated in Compton's testing. She agreed that

the calendars had sections for people's names, addresses, and telephone numbers, all of which were appropriately completed.

Compton also found it significant that applicant's expert witnesses at the 2001 punishment retrial (i.e., Halpin and Wright) determined that applicant's adaptive abilities had progressed since his imprisonment and that his progress indicated that he had a strong ability to learn. Compton noted that another witness at the 2001 retrial, Jo Ann Cross, had echoed Halpin's and Wright's testimony regarding applicant's ability to learn.

We find Compton's opinion far more credible and reliable than those of applicant's experts who testified at the 2014 evidentiary hearing.[56] The record shows that Compton is a forensic psychologist with considerable experience in conducting forensic evaluations. Her testimony shows that she thoroughly and rigorously reviewed a great deal of material concerning applicant's intellectual functioning and adaptive behavior. In addition, she personally evaluated applicant. During that evaluation, Compton administered comprehensive IQ testing via the WAIS-IV, a gold-standard test; various forms of effort testing to assess the validity of her IQ testing; and the TILS, a standardized measure of adaptive functioning. Compton testified in detail about why, even applying the most lenient standards, the results of her effort

---

[56] Although applicant presented Garnett's and Vitale's affidavits in support of his *Atkins* claim, neither affiant personally examined applicant and neither purported to diagnose applicant as intellectually disabled. Further, neither Garnett or Vitale testified at the evidentiary hearing. The bases for the assertions in their affidavits were therefore not subject to adversarial testing through cross-examination.

testing suggested that applicant had exerted suboptimal effort on the WAIS-IV. Compton also gave persuasive and unrebutted testimony explaining why applicant's score on the TILS under-represented his adaptive skills. She further detailed numerous examples in applicant's records that demonstrated his adaptive skills.

In contrast, Borda, Greenspan, and Anderson were clinical psychologists or clinical neuro-psychologists whose credibility suffered from their review of relatively limited material. Greenspan did not personally assess applicant, and his testimony suggested that his direct experience with IQ testing was fairly limited and remote in time.

Although he personally examined applicant, Borda conceded that the assessment was extremely brief and did not include comprehensive, full-scale IQ testing with a gold-standard instrument or effort testing. Borda and Greenspan also premised many of their conclusions on the concept of mental age and used the unreliable ratio method to calculate IQ scores from instruments that were not designed for such purposes. Although Anderson personally examined applicant, she did so for a purpose other than evaluating him for intellectual disability. Further, Anderson did not administer any test for the purpose of obtaining an IQ score and, from her testimony, she appeared to have completed relatively few intellectual-disability assessments.

Further, each of applicant's experts who testified at the evidentiary hearing appear to have applied a more demanding standard to the issue of adaptive behavior than we have contemplated for Eighth Amendment purposes. *See Cathey*, 451 S.W.3d at 19, 26–27

Although Borda testified that adaptive functioning is the ability to successfully do everyday things on one's own, he also characterized it as executive functioning.[57] Greenspan defined adaptive behavior as how one functions in the world and expressly acknowledged that adaptive behavior and executive functioning are distinct concepts. However, Greenspan's application of the definition to the evidence—for example, his minimization of the evidence that applicant had learned to survive on the street and in prison—suggest that he was actually applying a more stringent standard. Alternatively, it suggests that Greenspan's opinions were not reasonable. Anderson was not asked to define adaptive functioning, but in her testimony, she often equated adaptive functioning with executive functioning.

Compton's opinion finds further support in applicant's school records, which were accurately summarized at the 2001 punishment retrial by applicant's expert witness, Dee Dee Halpin. *See Cathey*, 451 S.W.3d at 23 (stating that the best source of retrospective information concerning adaptive

---

[57] Borda's definition of adaptive functioning as executive functioning appears to be inconsistent with the clinical standards that he purported to follow. According to Borda's affidavit, the DSM-V recognizes executive-functioning measures as more reliable indicators of intellectual functioning than IQ tests. But his affidavit is silent concerning whether the DSM-V recognizes executive-functioning measures as more reliable indicators of adaptive functioning than a standardized measure of adaptive functioning, for example. Borda appears to have imported the DSMV's recognition of executive-functioning measures in the intellectual-functioning context into the adaptive-functioning context. In the process, Borda seems to have implicitly transformed "adaptive functioning" into something more complex than the ability to perform a task.

behavior during the developmental period is usually school records because they provide an objective, unbiased documentation of a person's abilities at the most pertinent time). Those records reflect applicant's poor academic grades (especially in areas involving language), uneven conduct grades, retention in first grade, below-grade-level scores on academic-achievement tests, and references to instances of withdrawn behavior. In kindergarten, a physician considered the possibility that applicant's withdrawn behavior was due to intellectual disability, although the physician indicated that emotional problems were the more likely cause. Subsequent IQ testing on a gold-standard instrument yielded a score that was not in the intellectually disabled range—even considering the extreme low end of the scoring range—and applicant remained in regular classrooms throughout his time in school.

Although Compton found that applicant manifested some limitations in academic and social-interaction skills during the developmental period, she testified that his level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis. But even assuming for purposes of argument that applicant's limitations in academic and social-interaction skills were significant, the record does not support a finding that these deficits were linked to significantly sub-average general intellectual functioning. *See Hearn*, 310 S.W.3d at 428. Rather, the record overwhelmingly supports the conclusion that applicant's academic difficulties were caused by a variety of factors, including trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary schools three times in three years, racially motivated

harassment and violence at school, a history of academic failure, drug abuse, and absenteeism. The same is true of any social difficulty that applicant experienced during the developmental period.[58]

The significant advances applicant has demonstrated while confined on death row further support the conclusion that his academic and social difficulties were not related to significantly sub-average general intellectual functioning. In addition, our consideration of the *Briseno* evidentiary factors weighs heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning.

The first *Briseno* factor considers whether those who knew applicant best during the developmental stage considered him to be intellectually disabled and acted in accordance with that determination. *Briseno*, 135 S.W.3d at 8. The evidence does not weigh in applicant's favor.

Although the physician who examined applicant before kindergarten considered intellectual disability as a possible cause for applicant's withdrawn behavior, the physician contemporaneously stated that emotional problems were the more likely cause. Applicant's records do not reflect any intellectual-disability diagnosis, and they do show that he remained in normal classrooms during his school career.

---

[58] Although the record contains evidence of withdrawn behavior by applicant, we note that the record also includes abundant evidence of applicant's social success during the developmental period.

At the evidentiary hearing, habeas counsel attempted to show that applicant's father singled applicant out for abuse and threw applicant out of the house because he perceived applicant as being intellectually disabled or "slow." However, the record is replete with evidence that Junior physically and emotionally abused all of his children, as well as with evidence that Junior also drove some of applicant's siblings from the family home. Although there is evidence that applicant's inability to spell on command may have angered Junior, there is abundant evidence from multiple sources that applicant was the target of Junior's ire because he intervened in his parents' altercations, tried to protect his mother and other siblings from Junior, and often caught Junior in infidelity. The record also indicates that applicant was left in charge of his younger siblings. And applicant's sister, Colleen McNeese, testified at the 2014 evidentiary hearing that she had not considered applicant to be intellectually disabled.

Regarding the second *Briseno* factor, the evidence shows that applicant formulated plans and carried them through. *See id.* The various affidavits, testimony, and interviews that applicant's relatives have given indicate that, when he and his siblings were hungry, applicant took it upon himself to earn money from the neighbors and then used the money to buy food. During his 1980 trial, applicant insisted on presenting an alibi defense, and his testimony was consistent with that defense. He doggedly pursued his desire to obtain new appellate counsel after his 1980 trial by writing to various courts, attorneys, and organizations, filing pleadings and motions, and marshaling exhibits to present at the 1983 *Faretta* hearing. The previously mentioned conduct and incidents in applicant's prison disciplinary records

also indicate leadership, the third *Briseno* factor. *See id.*

The fourth and fifth *Briseno* factors address whether applicant responds rationally and appropriately to external stimuli and whether he responds coherently, rationally, and on point to oral or written questions. *See id.* The many instances of applicant's testimony and interactions with courts over the course of this case, as well as the testimony of witnesses at his 2001 punishment retrial, indicate that the answers to these questions are yes.

The varying statements that applicant gave to police about the offense and his 1980 and 1993 testimony indicate that he can hide facts or lie effectively in his own interest, the sixth *Briseno* factor. *See id.* The facts of the offense further indicate that it required forethought, planning, and moderately complex execution of purpose, the final *Briseno* factor. *See id.* at 8–9.

C. Onset During the Developmental Period

Given applicant's failure to prove by a preponderance of the evidence that he suffers from significantly sub-average general intellectual functioning and that any significant deficits in adaptive behavior are related to significantly sub-average general intellectual functioning, he has not established that he was intellectually disabled before the age of eighteen. *See id.*

In sum, we conclude that for Eighth Amendment purposes, applicant is a person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior. *See Cathey*, 451 S.W.3d at 26–27 (summarizing the "basic factual nature of the *Atkins* inquiry"). We

therefore reject applicant's contention that he is exempt from execution under *Atkins*.

IV. Conclusion

For the reasons discussed above, we deny relief on applicant's first claim after assuming our role as the ultimate fact-finder in this case regarding applicant's assertion that he is entitled to relief under *Atkins*. *See Flores*, 387 S.W.3d at 634–35; *Reed*, 271 S.W.3d at 727.

The habeas court did not enter findings of fact and conclusions of law regarding applicant's second and third claims for relief. In his second claim, applicant contends that he was denied due process because Texas's death-penalty statute does not contemplate intellectual disability as a bar to the execution of an intellectually disabled individual. In his third claim, applicant contends that his death sentence violated the Sixth Amendment under *Atkins* and *Ring v. Arizona*, 536 U.S. 584 (2002), because the jury's verdict did not include a determination of an essential element of capital murder—that he is not intellectually disabled. Applicant's briefing concerning his second claim is inadequate because he fails to plead and prove facts which would entitle him to relief. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The Court has previously rejected the *Ring* argument that applicant raises in his third claim. *See Briseno*, 135 S.W.3d at 10. Applicant's second and third claims for relief are denied.

As to applicant's remaining claims (Claims 4–48), we find that the record supports the habeas court's findings of fact, conclusions of law, and recommendation. We accordingly adopt "Respondent's Proposed Findings of Fact, Conclusions of Law, and

Order" regarding Claims 4–48, and deny relief on all of applicant's claims.

Delivered: September 16, 2015

Publish

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for Writ of Habeas Corpus
in Cause No. 314483-C in the 185th
Judicial District Court Harris County

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

As recommended by the habeas judge, it is time for Texas to reevaluate the decade-old, judicially created standard in *Ex parte Briseno* in light of a shift in the consensus of the medical community regarding what constitutes intellectual disability, and in light of the Supreme Court's recent holding in *Hall v. Florida* indicating that courts are required to consider that consensus in assessing intellectual-disability claims.[1] *See Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004); *Hall v. Florida*, __U.S.__, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) . In the absence of any legislative guidance, this Court created the *Briseno* standard as

---

[1] Whereas older case law uses the term "mental retardation," newer statutes and cases use the term "intellectual disability." I employ the latter term whenever possible.

a temporary solution to the problem of defining "that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty."[2] *Briseno*, 135 S.W.3d at 6. The standard was created in response to the Supreme Court's two-part holding in *Atkins v. Virginia* that (1) the Eighth Amendment of the federal Constitution prohibits the execution of a person with an intellectual disability as cruel and unusual punishment, and (2) each state must devise its own substantive and procedural mechanisms for determining which offenders are so intellectually disabled that there is a national consensus that it would be cruel and unusual to execute them. *Atkins v. Virginia*, 536 U.S. 304, 306, 321, 122 S. Ct. 2242 (2002). In response to *Atkins*'s first holding, the *Briseno* Court applied the same three-pronged general standard that had been employed by the Supreme Court to define intellectual disability. *Briseno*, 135 S.W.3d at 8. The standard was based on the American Association on Mental

---

[2] Merely lamenting the Texas Legislature's failure to act in the decade since *Atkins* was decided abdicates this Court's responsibility to ensure that federal constitutional rights are fully protected in Texas. *See Atkins v. Virginia*, 536 U.S. 304, 306, 321, 122 S. Ct. 2242 (2002). This Court cannot continue to apply an outdated and erroneous standard in the wishful hope that the Legislature will act soon, particularly in light of the fact that the legislative session just ended several months ago, and the Legislature does not meet again for approximately two years. Although it would obviously be preferable for the Legislature to set forth the policy with respect to who should be exempted from the death penalty on the basis of intellectual disability, this Court is required to uphold the federal Constitution as it has been interpreted by the Supreme Court. Doing what we have always done simply because the Legislature has not told us to do it otherwise is not the right answer.

Retardation (AAMR) criteria,[3] and it required an applicant to demonstrate evidence of (1) significantly subaverage general intellectual functioning, (2) related limitations in adaptive functioning, and (3) onset of the two preceding prongs prior to the age of eighteen. *Id* at 7. In response to *Atkins*'s second holding requiring each state to develop its own mechanisms for determining which offenders should be exempt from the death penalty on the basis of their intellectual disability, the *Briseno* Court initially "decline[d] to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature,"[4] but it then went on to

---

[3] *See* American Ass'n on Mental Retardation: *Mental Retardation: Definition, Classification & Systems of Supports* (9th ed. 1992). This definition is substantively the same as the one in Texas Health and Safety Code Section 591.003(13), and *Briseno* held that these definitions were appropriate as the general standard for deciding intellectual-disability claims in capital-murder cases. *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004). Because the *Briseno* Court indicated that the definition in the Health and Safety Code was interchangeable with the definition used by the American Association on Mental Retardation, I refer only to the AAMR definition, even though the analysis would also substantively apply to the definition in the Health and Safety Code.

[4] *See Briseno*, 135 S.W.3d at 6; *see also id.* at 8 ("Some might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment. However, that definitional question is not before us in this case because applicant, the State, and the trial court all used the AAMR definition. Until the Legislature provides an alternate statutory definition of mental retardation for use in capital sentencing, we will follow the AAMR or Section 591.003(13) criteria in addressing *Atkins* mental retardation claims.")

discuss a standard comprising seven evidentiary considerations, which, in practice, has been applied to determine whether an applicant's intellectual disability rises to the "level and degree" that a consensus of Texas citizens would agree that the death penalty would constitute cruel and unusual punishment. *Id.* at 6, 8-9. Thus, rather than separately consider the two steps by keeping the medical considerations apart from the legal ones, *Briseno* instead has been interpreted as conflating the two steps into a single analysis. By placing the legal standard's seven evidentiary considerations into the adaptive-deficits analysis in the medical standard, as this Court's majority opinion does today, the *Briseno* Court created a novel test for assessing claims of intellectual disability that has been widely criticized as applying an unscientific standard.[5] More importantly, *Briseno*

---

[5] *See, e.g.*, Nancy Haydt, Stephen Greenspan, & Bhushan Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 U. MISS-KANSAS CITY L. REV. 359, 384 (2014) (observing that *Briseno* set forth a "list, for which no scientific justification was given" of "vaguely specified seven behaviors which the court believed could be used to rule out a diagnosis of ID"); John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY RTS. J. 393, 399 (2014) (Texas's *Briseno* factors make it "extraordinarily difficult to prove deficits in adaptive functioning"); Kate Janse Van Rensburg, *The DSM-5 and Its Potential Effects on* Atkins v. Virginia, 3 U. MEMPHIS SCHOOL OF L. MENTAL HEALTH L. & POL'Y J. 61, 79 (2013) ("Texas' definition has not been successful in achieving any of *Atkins*' aims but has been successful in severely limiting the number of defendants who were actually found to be intellectually disabled."); John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18

conflicts with the Supreme Court's rationale in *Hall* in that its test for determining intellectual disability is not grounded in the current consensus of the medical community. There is no authority, medical or legal, that supports this kind of hybrid assessment of intellectual disability. This Court should take this opportunity to modify the *Briseno* test to require a bifurcated inquiry.

First, a court should determine whether a defendant is intellectually disabled based on the current standards employed by the medical community in the manual of the American Association on Intellectual and Developmental Disabilities (AAIDD, formerly known as the AAMR). Because this Court's majority opinion continues to apply the former medical standard that was in effect in 2004, rather than the prevailing views held by the medical community today, I would modify this portion of *Briseno* to reflect the current standards. In applying the current scientific standards to this case, I would hold that an IQ score is not definitive evidence of a lack of intellectual disability in a case such as this, where the majority of numerous IQ tests spanning decades have consistently indicated that applicant is in the range of an intellectually disabled person, and the habeas court

---

CORNELL J.L. & PUB. POL'Y 689, 710 (2009) ("The *Briseno* factors present an array of divergences from the clinical definitions."); James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later—A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 383-84 (2014) ("The Supreme Court's emphasis on scientific and clinical understanding of intellectual disability calls into question the approach by a few courts that rest heavily on stereotypes about people with intellectual disability rather than on the scientific knowledge and experience accumulated by professionals in the field.").

found that evidence credible by determining that applicant has proven the first prong of his *Atkins* claim. Furthermore, in determining whether a defendant is intellectually disabled, I would hold that it is improper to commingle the seven evidentiary considerations that comprise the legal standard described in *Briseno* with the analysis of adaptive deficits pertinent to the medical community's standard, and I would clarify that the legal and medical inquiries are separate and should be subject to distinct analyses.

Assuming that the evidence shows that a defendant is intellectually disabled according to the current medical standards, then a court would progress to the second step that requires a determination of whether the extent of his intellectual disability is such that, as a matter of federal constitutional law, his execution for capital murder would constitute cruel and unusual punishment in violation of the Eighth Amendment. It is only at this second step that a court should consider the type of evidence that is focused on the comparison and weighing of positive skills against deficits, similar to the seven evidentiary considerations in *Briseno*, so as to determine whether there would be a national consensus that a person at that level and degree of disability should not be subject to the death penalty. Furthermore, with respect to the second step, I would reformulate the seven evidentiary considerations described in *Briseno* so that they more closely track the types of considerations that persuaded the Supreme Court to decide that the execution of an intellectually disabled person would violate the Eighth Amendment.

In sum, I disagree with the majority opinion's conclusions that this Court properly "continue[s] to follow the AAMR's 1992 definition of intellectual

disability" and that the *Briseno* standard "remains adequately 'informed by the medical community's diagnostic framework.'"[6] Because the decade-old *Briseno* standard was never intended to be permanent, it has become necessary to examine whether its continued application remains consistent both with the views currently held by the scientific community and with the societal consensus as to those offenders who, by virtue of their intellectual disability, should be exempted from the death penalty. *See Briseno*, 135 S.W.3d at 5 ("[W]e must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims."). After reformulating the standard, I would remand this case for the habeas court to consider whether, under the revised standard, it recommends granting relief to Bobby James Moore, applicant. I, therefore, respectfully dissent.

I. Step One: A Court Must Decide Whether a Defendant Has an Intellectual Disability By Applying Current Scientific Standards

In light of both *Atkins* and *Hall*, a court reviewing an intellectual-disability claim is compelled to consult current medical standards in determining whether a particular offender falls within the medical definition of an intellectually disabled person. Although this Court is applying (A) the Supreme Court's same three prongs that make up the general standard for deciding whether a person has an intellectual disability, this Court's majority opinion is flawed in its substantive assessment of the first two prongs because, in contravention of current medical standards, (B) it improperly

---

[6] *See* maj. op., at 5-6 (quoting *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014)).

applies a strict cutoff based on IQ scores, and (C) it erroneously applies unscientific criteria to assess whether a defendant has adaptive deficits.

A. The Supreme Court Requires a Court to Consider Current Medical Standards in Evaluating Whether the Evidence Establishes the Three-Pronged General Standard for Intellectual Disability

Although it set forth a general standard, the Supreme Court in *Atkins* left it to the states to devise a precise test for determining which offenders are so intellectually disabled that there is a national consensus that it would be cruel and unusual to execute them. *Atkins*, 536 U.S. at 317 (explaining that prohibition on executing intellectually disabled individuals extends to those "mentally retarded offenders about whom there is a national consensus," but leaving to the states "'the task of developing appropriate ways to enforce the constitutional restriction'") (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416 (1986)). But the Court in *Atkins* did not permit States to have complete autonomy in making this determination. *See Hall*, 134 S. Ct. at 1999 ("*Atkins* did not give the states unfettered discretion to define the full scope of the constitutional protection"; "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity"). In *Hall*, the Supreme Court characterized its *Atkins* decision as providing "substantial guidance on the definition of intellectual disability." *Id.* (citing *Atkins*, 536 U.S. at 318). The *Atkins* Court observed that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as

communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 U.S. at 318. Recognizing that there is a wide range of individuals who might be characterized as intellectually disabled, and recognizing that not all such individuals would be constitutionally exempted from the death penalty, the Supreme Court described the group of people whose executions would violate the federal Constitution as those who, "[b]ecause of their impairments, [ ] by definition [ ] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* Further describing the class of intellectually disabled people who are exempt from the death penalty, the Court also noted that "there is abundant evidence that [such individuals] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.* In providing these descriptions, the *Atkins* Court acknowledged the standards set forth in the manual of the American Association on Mental Retardation and the Diagnostic and Statistical Manual of Mental Disorders-IV (DSM-IV).[7] *Id.* at 308 n. 3.

More than a decade after the *Atkins* decision, the Supreme Court reaffirmed the general standard for determining intellectual disability in *Hall*. *See Hall*, 134 S. Ct. at 1994 ("As the Court noted in *Atkins*, the medical community defined intellectual disability

---

[7] *See* American Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification & Systems of Supports* (9th ed. 1992); American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000).

according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period."). Addressing the first prong in the general standard, the *Hall* Court held that, because the medical community's diagnostic framework does not quantify intellectual disability at an IQ score of seventy or below, it would violate the federal Constitution to limit the protections of the Eighth Amendment only to those offenders whose test scores are at or below that precise level. *Id.* at 1998. In reaching that holding, the Court considered and was persuaded by the medical community's current diagnostic framework. *Id.* at 1993, 2000 (stating that the "legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework," and further observing that "it is proper to consult the medical community's opinion").

Viewed in conjunction, *Atkins* and *Hall* reveal that, for over a decade, the Supreme Court has applied the same three-prong general standard for analyzing intellectual-disability claims. Furthermore, *Hall* in particular signals that, even if a state is applying this same general standard, as did Florida in *Hall*, the federal Constitution may nonetheless be violated based on the particular analytical measures by which the state determines each of the three prongs. Even though the purpose of Florida's statute was to provide a legal standard that would permit anyone with an IQ level above 70 to be subject to the death penalty, the Supreme Court held that Florida's standard was constitutionally invalid because it was "in direct opposition to" the current medical standard for

diagnosing intellectual disability, which does not provide for a cutoff in that manner. *See id.* at 2001. Having permitted each state to create its own test for deciding which people with intellectual disability would be exempt from the death penalty, the Supreme Court nonetheless held that, in the implementation of that policy decision, Florida had no discretion to misapply the current standards of the medical community for assessing intellectual disability. *See id.*

The present case presents a situation analogous to that in *Hall* in that, in the implementation of a policy decision describing who should be constitutionally exempted from the death penalty, Texas has no discretion to misapply the standard of the current medical community for assessing intellectual disability. *See id.* at 1999-2001. I would hold that this Court must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and that the reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable.

To this end, I would modify this Court's analysis in *Briseno* so that it conforms to the current consensus of the medical community. Like the Supreme Court in *Atkins*, *Briseno*'s analysis of intellectual disability was premised on the definition in the AAMR's ninth edition, but since the time that *Atkins* and *Briseno* were decided, the AAMR has been renamed to the AAIDD, and it is now in its eleventh edition.[8] Rather than rely on the older editions, the Supreme Court discussed the AAIDD's eleventh edition in *Hall*. *See Hall*, 134 S. Ct. at 1995. Similarly, like the

---

[8] AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010).

Supreme Court in *Atkins*, *Briseno*'s analysis of intellectual disability considered the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), but since the *Atkins* and *Briseno* decisions, that manual has been superseded by the Fifth Edition, the DSM-5.[9] Rather than rely exclusively on the older scientific standards as this Court does today by continuing to apply an unmodified *Briseno* standard, this Court, like the Supreme Court in *Hall*, should, at a minimum, consider how the developments in the scientific standards during the past ten years might affect a judicial determination of intellectual disability.[10] *See Hall*, 134 S. Ct. at 2000 (explaining that, as compared to the DSM-IV, the DSM-5 places less emphasis on a person's IQ score than on the person's adaptive deficits). Because the medical community's

---

[9] American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

[10] The substance of Section 591.003(13) remains as it was when *Briseno* was decided, although some of the terminology has changed, such as the term "mental retardation," which is now called "intellectual disability." *See* TEX. HEALTH & SAFETY CODE § 591.003(13), (7-a) ("'Intellectual Disability' means significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."); § 591.003(1) ("'Adaptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group."); § 591.003(20) ("'Subaverage general intellectual functioning' refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used."). The changes to the terminology were enacted by House Bill 1481 in 2011 in order to make the language referring to intellectual disabilities more respectful, but that legislation did not alter the substance of the definitions. *See* Tex. H.B. 1481, 82nd Leg., R.S. (2011).

views on the assessment of intellectual disability have changed in the last decade, the Supreme Court in *Hall* considered the current consensus of the scientific community in deciding the merits of that case. This Court should follow suit. As I explain below, the DSM-5 has several important differences from the DSM-IV with respect to the proof of intellectual disability, and these differences require this Court to modify the *Briseno* standard.

(B) Prong One: A Strict Cutoff Based on IQ Scores is Contrary to Current Medical Standards

This Court's majority opinion is contrary to the *Hall* Court's holding that an intellectual-disability claim should not be rejected by treating an IQ score as a precise number because the medical community does not quantify intellectual disability at an IQ score of seventy or below, nor does it treat an IQ score in the marginal range as being dispositive of an intellectual-disability diagnosis. *Hall*, 134 S. Ct. at 1998-2001. In explaining its finding that applicant had significant limitations in intellectual functioning, the habeas court made finding of fact number 78, in which it noted that IQ tests are not able or even designed to produce a single and precise figure, but rather are best conceptualized as a range of scores. The habeas court's finding that IQ test results should be treated as a range rather than as a precise number is consistent with the *Hall* Court's holding, and, therefore, this finding should be upheld by this Court. *See id.*

Whereas the Court in *Atkins* had considered the views of the medical community in the then-current DSM-IV, the Court in *Hall* considered the current DSM-5 in deciding that Florida's strict IQ cutoff was unconstitutional. *Compare Atkins*, 536 U.S. at 308 n. 3 (discussing DSM-IV), *with Hall*, 134 S. Ct. at 2000

(relying on the DSM-5 and quoting it for the proposition that "'IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks'"). Furthermore, as support for its conclusion that it was "not sound to view a single factor as dispositive of a conjunctive and interrelated assessment" of intellectual disability, and citing to the DSM-5, the Supreme Court observed that "a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Hall*, 134 S. Ct. at 1995, 2001. By applying a standard error of measurement but then using a strict cutoff based on IQ scores, this Court's majority opinion is effectuating the same type of standard that the Supreme Court rejected in *Hall* as constitutionally unacceptable.

Although analysis of IQ has not been completely removed from the diagnostic determination of intellectual disability in the DSM-5, its importance has been greatly reduced as compared to the DSM-IV. *See id.* Under the DSM-5, it is possible for a person with an IQ test result higher than 75 to be characterized as intellectually disabled depending on his adaptive functioning, as compared to the DSM-IV, which specifies that the 75 score would be dispositive within the margin of error. *Id.* Here, according to this Court's majority opinion, taking into account the standard error of measurement and ignoring the Flynn effect, the two tests it finds acceptable produced an IQ score range from 69-83, and this, therefore, would constitute an adequate basis for rejecting

applicant's claim.[11] For the limited purposes of this discussion, I will accept the majority opinion's conclusion that the only two valid scores are applicant's 1973 WISC score and his 1989 WAIS-R score, which are higher than the other six scores. According to the DSM-5, applicant's IQ score alone should not be enough to reject his claim because it is necessary to also consider his adaptive functioning in conjunction with his IQ score. Given the reasoning of *Hall*, which requires a court to at least consult current medical standards in reaching a determination of intellectual disability, I disagree with this Court's majority opinion as to prong one of its intellectual-disability analysis that holds that applicant's IQ scores ranging from 69-83, part of which fall below 70, are alone an independent reason for finding that he is not intellectually disabled.

I also disagree with this Court's majority opinion for the two additional reasons, as explained below, that (1) it cherry picks applicant's two higher IQ scores and (2) it disregards the other scores: the OLMAT (77), Slosson (57), WAIS-R (abbreviated) (71), 2013 RCPM (85), the WAIS-IV (59), and the derived scores on the Bender Gestalt (67) and Goodenough (72). First, I disagree with the majority opinion that it is proper to

---

[11] *See* maj. op., at 71 ("taking into account the standard error of measurement, applicant's score range on the WISC is between 73 and 83"; taken altogether, there is "no reason to think that applicant's obtained IQ score of 78 on the WISC is inaccurate or does not fairly represent his borderline intelligence during the developmental stage"); *see also id.* at 71-72 ("the score that applicant obtained on the 1989 WAIS-R supports the conclusion that his WISC score accurately and fairly represented his intellectual functioning during the developmental period"; his score range on the WAIS-R "is between 69 and 79").

dismiss the WAIS-IV, the most recent and comprehensive test on which applicant scored a 59 in 2013, a score impliedly determined to be credible by the habeas court. The majority opinion's rationale for rejecting that test is that applicant put forth suboptimal effort because the State's expert, Compton, indicated that applicant had a motive to do poorly and gave suboptimal effort. The habeas court, however, impliedly found the evidence that applicant gave suboptimal effort not to be persuasive. The State's expert's testimony that applicant gave suboptimal effort was contradicted by a defense expert, Greenspan, who testified that it is difficult to interpret effort-test results as to intellectually-disabled individuals because of problems validating those tests, and such tests thus have reduced significance in this context. Furthermore, even accepting the majority opinion's analysis that the other scores are less reliable because they were based on noncomprehensive instruments, they were neuropsychological tests rather than IQ tests, and they used the now-disfavored concept of mental age to arrive at the score, these scores should not be disregarded in their entirety in that they provide some evidence that supports the habeas court's findings that applicant had significant limitations in intellectual functioning. These other tests also provide evidence that supports the habeas court's findings that applicant did not give suboptimal effort in taking his most recent IQ test and that the State's expert's testimony on suboptimal effort lacked credibility. In short, even if the five other tests showing applicant as intellectually disabled do not stand alone as definitive evidence of intellectual disability, they, in conjunction, support the habeas court's fact finding that applicant's most recent IQ score is reflective of limitations in intellectual

functioning. In the absence of the testimony from Dr. Compton, which was implicitly found not credible by the habeas court with respect to suboptimal effort, applicant's most recent IQ test places him easily within the range of IQ scores that show intellectual disability. And, although this Court is the ultimate fact finder, the credibility determinations regarding which expert was most believable should be left to the habeas court as the original fact finder in this case.

Second, even if the majority opinion is correct in disregarding the applicant's most recent IQ score, and even if it is correct that this Court should rely solely on the WISC administered at age 13 that produced a score of 78 and the WAIS-R at age 30 that produced a score of 74, these scores, under the current medical standards, would still require this Court to examine whether applicant has adaptive deficits.[12] Taking into account the standard error of measurement and ignoring the Flynn effect, these two tests produce a range from 69-83. A diagnosis of intellectual disability is often indicated by an IQ score of 70 or below, but, as the Supreme Court held in *Hall*, 70 is not a strict cutoff point beyond which the possibility of intellectual disability is foreclosed. *Hall*, 134 S. Ct. at 1996. Even disregarding most of the evidence that the habeas court found credible and relying only on applicant's two highest scores, the score range supports a finding that applicant has established the first prong.

Although I conclude that the record appears to support the habeas court's determination that applicant has significantly subaverage general intellectual

---

[12] When the test took place, the administrator made a slight error that caused this test score to originally be recorded as 74. The error has since been acknowledged, so we need only concern ourselves with the correct score.

functioning based on reliable IQ scores, I would not definitively decide that question today in order to permit the original fact finder to apply the correct modified standard to the evidence in this case.

(C) Prong Two: Unscientific Criteria Should Not Be Used to Assess Adaptive Deficits

The *Briseno* analysis of the adaptive-deficits prong makes Texas's determination of intellectual disability unconstitutional because, as observed by the Supreme Court in *Atkins* and *Hall*, any such assessment should be informed by the current diagnostic standards employed by the medical community. More specifically, in light of the Supreme Court's analysis on this subject, the majority opinion's continued application of the *Briseno* standard is constitutionally unacceptable because it relies on an unscientific assessment that (1) considers adaptive deficits based on the DSM-IV alone, (2) includes a comparison to the fictional character Lennie; and (3) considers seven evidentiary factors that are inapplicable in this context.

1. Adaptive Deficits Should Not Be Based on the DSM-IV Alone

The *Briseno* Court's decision to place a legal standard into the medical criteria for establishing adaptive deficits produced an unscientific standard that is inconsistent with the requirement that any standard be informed by current medical criteria. The DSM-5 altered the "adaptive functioning requirement" by describing it as how well a person meets community standards of personal independence and social responsibility in comparison to others of similar age and sociocultural background. *See* American Psychiatric Ass'n, *DSM-5 Intellectual Disability Fact Sheet* (2013); *see also* Shelly Yeatts, Texas District and

County Attorneys Association, *Significant Changes from the DSM-IV to the DSM-5* (November 2013). The DSM-5 relies more on adaptive functioning than the DSM-IV did, both for diagnosing intellectual disability and for determining its level of severity. *Id.*; *see also* Walter Kaufmann, *Intellectual Disabilities's DSM-5 Debut*, SPECTRUM NEWS 2013. In terms of diagnosis, the DSM-5 assesses the level of adaptive functioning in three domains: social, conceptual, and practical skills,[13] and it requires at least one domain that includes several skill areas of adaptive functioning versus two or more skill areas in the DSM-IV. In short, the type of analysis for establishing adaptive functioning is different in the DSM-IV than in the DSM-5, and this Court should modify the *Briseno* test to conform to the current scientific standards. I, therefore, disagree with this Court's majority opinion as to prong two of its intellectual-disability analysis that rejects applicant's claim based on his failure to prove adaptive deficits under a standard that is no longer employed by the scientific community in assessing intellectual-disability claims.

Furthermore as to prong two, the DSM-5 appears to more readily acknowledge that people with intellectual disabilities are often able to perform basic life functions and tasks, such as holding jobs, driving cars,

---

[13] *See APA Intellectual Disability Fact Sheet*, at 1. The social skills domain considers the awareness of others' experiences, empathy, interpersonal communication skills, friendship abilities, social judgment, and self-regulation, among others. The conceptual domain considers language, reading, writing, math, reasoning, knowledge, and memory, among others, used to solve problems. The practical domain considers self management across life settings, including personal care, job responsibilities, money management, recreation, managing one's behavior, and organizing school and work tasks, among others.

and supporting their families. *See Wiley v. Epps*, 625 F.3d 199, 203, 204 (5th Cir. 2010). People with intellectual disabilities may be able to (1) read, write, and perform some rudimentary math; (2) have friends; (3) maintain personal hygiene; (4) drive a car on occasion; (5) appropriately groom themselves and possess a driver's license; and (6) maintain a relationship.[14] None of these skills or abilities are necessarily inconsistent with intellectual disability. This Court's majority opinion, however, gives heavy weight to applicant's ability to perform some of the functions listed above even though the current scientific community would discount that type of behavior as dispositive evidence of adaptive functioning. I disagree with this Court's majority opinion as to prong two of its intellectual disability analysis that rejects applicant's claim based on his failure to prove adaptive deficits by giving great weight to evidence that is no longer credited by the scientific community in assessing intellectual disability claims.

Additionally as to proof of adaptive functioning or adaptive deficits, unlike the DSM-IV that permitted evidence about a defendant's behavior in prison, the DSM-V recommends that this assessment be determined outside of a prison setting. *Wiley*, 625 F.3d at 203, 204. The DSM-5 recognizes that people on death row operate within a world where choices are extremely limited, even for such basic matters as when to wake up and when to go to bed, what to eat, when to shower or change clothes, and other life basics. The

---

[14] *See* John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY RTS. J. 393, 408 (2014).

DSM-5, therefore, discounts much of the evidence about a defendant's ability to function inside a prison setting. This Court's majority opinion, however, gives heavy weight to applicant's ability to function and work while on death row even though the current scientific standards in the DSM-5 would discount that type of behavior as evidence of adaptive functioning, because ordinarily the kinds of tasks that are assigned can be performed by someone who is intellectually disabled.

But, perhaps, not all evidence obtained during a defendant's prison stay is immaterial to the question of his adaptive deficits or functioning. Any decision to consider a defendant's prison behavior must be examined closely for details that might show learned behavior from the great repetition of an event or limited choices. For example, here, this Court's majority opinion considers applicant's use of commissary slips in prison to suggest that he does not have adaptive deficits because he could understand the math involved to manage his commissary. The majority opinion relies on the testimony of Jerry LeBlanc, a prison official who testified that applicant appeared to understand his commissary order and that applicant did not receive any assistance from LeBlanc. But it is apparent that the habeas court was unpersuaded that LeBlanc's testimony demonstrated applicant's lack of adaptive deficits. In finding of fact number 169, the habeas court found that applicant had significant difficulty in filling out his commissary slips and in negotiating the $85 spending limit. The habeas court further mentioned that its examination of the commissary records revealed "numerous mathematical and spelling errors" on the slips as well as commissary requests adding up to significantly more than the spending limit on fifteen out of twenty-

four slips in evidence. The habeas court found that the repeated mathematical errors and consistent excessive ordering combined with the simple, unchanging spending limit reflected a lack of understanding of these basic concepts. I disagree with this Court's majority opinion's analysis as to prong two that rejects applicant's claim based on his purported failure to prove adaptive deficits by considering his general ability to function on death row when much of that type of evidence is no longer considered probative by the scientific community in assessing intellectual disability claims due to the repetitive nature of the events and limited choices, and, to the extent that certain jail-house evidence can be probative, the habeas court found that the State's evidence was lacking in credibility and unpersuasive.

I also note that the majority opinion decides that applicant does not have adaptive deficits, in part, by considering *pro se* documents that he presented for his writ application. However, applicant's counsel presented evidence that applicant may have had help in preparing those documents. Again, the habeas court appears to have credited the applicant's evidence more than the State's evidence. Ordinarily, this Court, as the ultimate fact finder, defers to the habeas court, the original fact finder, on matters involving credibility of the evidence.

The majority opinion makes many observations that conflict with the habeas court's assessment of adaptive deficits, but it does so by applying the *Briseno* test that I conclude does not comply with the Supreme Court's requirements in *Hall*. Although I disagree with some of the majority opinion's analysis with respect to the lack of evidence of adaptive deficits, I would not decide this question here but would instead remand for the

habeas court to reconsider the evidence under a new modified test that considers current medical standards, and, as explained below, omits the Lennie standard and the seven evidentiary considerations.

2. The Second Prong on Adaptive Deficits Should Not Include a Comparison to Fictional Character

Even if the literary reference to Lennie was simply an attempt to write colorfully gone awry, its inclusion in *Briseno* suggests that people who are severely or profoundly intellectually disabled would not be subject to the death penalty; that people who are mildly intellectually disabled would be subject to the death penalty; and that people who are moderately intellectually disabled may, depending on the circumstances, be subject to the death penalty. *See Briseno*, 135 S.W.3d at 6. The *Briseno* Court discussed the then-existing DSM-IV four subcategories for mental retardation: "mildly mentally retarded, moderately mentally retarded, severely mentally retarded, and profoundly mentally retarded." *Id.* This Court then stated,

> The functioning level of those who are mildly mentally retarded is likely to improve with supplemental social services and assistance. It is thus understandable that those in the mental health profession should define mental retardation broadly to provide an adequate safety net for those who are at the margin and might well become mentally-unimpaired citizens if given additional social services support. We, however, must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from

> the death penalty. Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? . . . As a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature.

Id. In referring to Lennie as someone who might be exempt from execution whereas others unlike him would not be, this Court's opinion has been read as implying or holding that those individuals who are less than severely or profoundly intellectually disabled would not be exempt from execution. Under that standard, Texas law creates a blanket rule that makes it constitutionally permissible to execute someone who the DSM-IV would catagorize as mildly or moderately intellectually disabled. I conclude that, to the extent that the Texas standard categorically permits the execution of a mildly or moderately intellectually disabled person, even one whose intellectual disability is such that he has a "diminished capacit[y] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," then the Texas standard is unconstitutional. *See Atkins*, 536 U.S. at 318 (discussing the justification for holding that the federal Constitution prohibits the execution of intellectually disabled people). I would hold that the

Lennie standard does not meet the requirements of the federal Constitution because it potentially permits the execution of a mildly or moderately intellectually disabled offender who meets the legal definition of *Atkins*, and it categorically limits the protections of the Eighth Amendment to those offenders determined to be severely or profoundly intellectually disabled. I conclude that any standard set forth by Texas must at least contemplate the possibility that someone categorized as mildly or moderately intellectually disabled in the DSM-IV might have the specific type of adaptive deficits to make him ineligible for execution according to the Supreme Court's reasoning in *Atkins*. Therefore, I would set forth a standard that does not include any reference to a fictional character as a basis of comparison for deciding whether a person is exempt from the death penalty by reason of his intellectual disability.

3. Adaptive Deficits Should Not Include the Seven *Briseno* Evidentiary Considerations

The *Briseno* Court mentions seven evidentiary considerations that could be considered as part of an assessment of a defendant's adaptive deficits, but it did so without any supporting authority. This Court stated,

> [S]ome other evidentiary factors which factfinders . . . might also focus upon in weighing evidence as indicative of mental retardation:
>
> - Did those who knew the person best during the developmental stage — his family, friends, teachers, employers, authorities—think he was mentally retarded at the time, and, if so, act in accordance with that determination?

- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8.

These seven questions do not belong in any determination about a defendant's adaptive deficits. Although they have similarity to some of the inquiries about adaptive deficits, these seven questions have a different focus from a determination on adaptive deficits in that they weigh a defendant's positives against his negatives. The weighing of positives against negatives is unlike a scientific determination of adaptive deficits, which looks solely at a person's inability to perform certain functions. Because it improperly conflated the legal standard with the medical standard in its decision permitting the injection of seven unscientific questions to evaluate adaptive deficits, the *Briseno* standard erroneously applies modern scientific principles. I, therefore,

would hold that the seven questions have no application to a decision about adaptive deficits.[15]

Rather than conflate a legal policy standard with a medical standard, this Court should limit the first step in its analysis to a determination whether the medical community would consider an individual to be intellectually disabled. If a defendant fails to meet this test, then his claim likewise fails. But if a defendant can show that the medical community would consider him to be intellectually disabled, then the Court would progress to the second step.

II. Step Two: Determination of the Legal Standard Whether There Is a National Consensus Against the Death Penalty For Someone at the Applicant's Level of Intellectual Disability

I do not suggest that the type of information in the seven *Briseno* evidentiary considerations must be entirely excluded from any analysis of intellectual disability, but instead I would confine those kinds of questions to a second step in an analysis that occurs only after finding that a defendant is, according to prevailing medical/scientific standards, intellectually disabled. Furthermore, I would modify the seven questions so that they would more closely reflect the underlying rationale for disallowing the execution of certain intellectually disabled offenders.

---

[15] Because my primary disputes with the majority opinion are with respect to the first two prongs, and because I believe this case must be remanded for the habeas court to reconsider the evidence under a revised standard for deciding intellectual-disability claims, I do not, at this juncture, include an analysis of the third prong with respect to whether applicant has proven the onset of any intellectual disability prior to age eighteen.

The second, third, and fifth *Briseno* questions are appropriately founded on the Supreme Court's *Atkins* opinion. The second question asking about whether the defendant can formulate plans or exhibits impulsive conduct, the third question about whether he is a leader or a follower, and the fifth question about whether his communication is coherent or irrational all target the reasons why the Supreme Court determined that the federal Constitution prohibits the execution of intellectually disabled people. The *Atkins* Court identified those reasons, observing that "[b]ecause of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." *See Atkins*, 536 U.S. at 318. The Court also noted that "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.* These three *Briseno* factors track the legal rationale underpinning *Atkins* and, I conclude, are appropriate considerations when deciding whether a person is legally exempt from the death penalty.

Turning to the remaining questions, the first and seventh factors may be appropriate if they are modified. The first question asks, "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at the time, and, if so, act in accordance with that determination?" One problem with this question is that it appears to invite individuals to give their subjective opinions comparing the defendant to a stereotype of how they believe an intellectually disabled person would appear or behave.

Although I conclude that it is appropriate to consider evidence by a defendant's family, friends, teachers, employers, authorities, and anyone else who the defendant had contact with during his developmental period, I conclude that the more appropriate inquiry should focus on those individuals' observations about the kinds of deficits and behaviors that made the defendant unlike his peers, what those deficits were, and how they were addressed.[16] *See Hall*, 134 S. Ct. at 1996 (factors that indicate whether the person "had deficits in adaptive functioning . . . include evidence of past performance, environment, and upbringing"). By targeting the evidence to specifically address observations of a defendant's adaptive deficits, the fact finder can decide whether the level and degree of those

---

[16] In assessing adaptive functioning, clinicians focus on a variety of deficits. "AAIDD's classification manual emphasizes the actual impact of intellectual limitations on the individual's life: 'Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.' Among the tools available to clinicians in diagnosing adaptive deficits are standardized psychometric instruments known as adaptive behavior scales. Unlike IQ tests, these instruments are not administered to the person who is being evaluated, but rather focus on other sources of information, including information provided by teachers, family members, and others familiar with the individual's everyday functioning. Along with school and social service records and similar evidence, these may permit an evaluator to determine whether the reduced cognitive functioning measured by IQ tests constitutes a real-world disability in the individual's life. Since adaptive behavior inquiries in the context of a capital trial are, of necessity, retrospective in nature, a thorough individual, educational, and family history becomes essential." James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later–A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 388-89 (2014).

deficits amount to a conclusion of intellectual disability such that a defendant may not constitutionally be executed. The first *Briseno* question, therefore, may be appropriately considered if it is modified to target adaptive deficits.

The seventh *Briseno* question focuses on whether the defendant's offense required forethought, planning, and complex execution of purpose. That question could be of marginal relevance if the offense required those things but the defendant's particular role in the offense did not. A more appropriate question would align with the rationale underlying *Atkins* by asking whether the defendant's acts in the commission of the offense show that he had a diminished capacity to understand and process information, to communicate, to abstract from mistakes, to learn from experience, to engage in logical reasoning, to control impulses, to understand the reaction of others, and whether he was a follower rather than a leader (if the offense was committed by a group). *See Atkins*, 536 U.S. at 318. The seventh *Briseno* question, therefore, may be appropriately considered if it is modified to target the adaptive deficits of the defendant that may have been exhibited during the commission of the offense so as to permit a fact finder to determine whether the level and degree of his intellect warrants a legal exemption from the death penalty.

I also conclude that the remaining two questions are inappropriate and should be eliminated as irrelevant. These two questions focus on the rationality of an offender's response to external stimuli and on whether he can hide facts and lie effectively.[17] The Supreme

---

[17] "A feature of adaptive behavior that causes some confusion is that the focus is exclusively on deficits and not on strengths. At first blush, the exclusive focus on deficiencies may seem

Court in *Atkins* did not specifically list either of these considerations as constituting reasons why executing the intellectually disabled is unconstitutional. *See Atkins*, 536 U.S. at 318. It is unclear how information about a defendant's response to external stimuli would assist anyone is deciding whether he is constitutionally ineligible for execution. Perhaps the question about a defendant's ability to lie effectively was intended to target his ability to understand and process information in that someone who can consistently maintain a lie without contradiction might have higher intellectual reasoning. But maintaining a lie seems to include a moral compass that is immaterial to whether someone has an intellectual deficit, and the other questions seem to better reveal whatever might be relevant from this question without its prejudicial component. I fail to see any sound reason why these two questions would be proper evidentiary considerations in determining whether a particular individual has demonstrated that he is ineligible for execution under the reasoning of *Atkins*.

---

counterintuitive, but clinicians have long recognized that for almost all individuals with intellectual disability, functional weaknesses coexist with strengths, and there is no 'list' of things that no individual with intellectual disability can do. With the increased focus on adaptive deficits after *Hall*, there is a substantial risk that triers of fact may fall into the trap of relying on unfounded and inaccurate stereotypes about what people with intellectual disability can and cannot do. Courts will need to be particularly careful not to rely, either directly or indirectly, on such stereotypes." James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later–A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 388-89 (2014).

Some of these seven considerations, and perhaps other evidence, should be considered as part of a second step that is addressed only after a court has determined that a defendant has proven the three prongs in the AAIDD. The second step of an Eighth Amendment intellectual-disability analysis should focus on whether a defendant who has proven that he has an intellectual disability has also shown that, according to the reasoning of *Atkins*, the extent of his disability is such that it would constitute cruel and unusual punishment to execute him for capital murder. I would hold that only some of the seven *Briseno* factors may remain viable, and only to the extent that they provide information relevant to the legal determination whether the extent of a defendant's intellectual disability rises to the level that there is a national consensus against permitting him to be executed.

III. Conclusion

Because the habeas court's findings of fact and conclusions of law were premised on an attempt to apply parts and distinguish other parts of the *Briseno* standard, I would set forth a new modified standard for deciding intellectual disability claims and remand this case to the habeas court. I limit this dissenting opinion to voicing my concerns with the continued application of the *Briseno* standard, which I believe does not conform to the requirements of the federal Constitution, and to set forth some possibilities for a modified standard. I do not attempt to formulate a precise standard to replace the now-outdated *Briseno* standard. Any new or revised standard ultimately should be made by the Legislature, but until then, in the absence of statutory guidance, a new standard should be developed by a majority of the judges on this

Court, and taking into account the informed view of a consensus of the medical scientific community and the people of the State of Texas.

Filed: September 16, 2015

Publish

APPENDIX B

IN THE 185 JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 314483-C

Ex Parte BOBBY JAMES MOORE,

Applicant

February 6, 2015

Addendum Findings of Fact and
Conclusions of Law on Claims 1-3

This court has previously disposed all other contested matter in the above referenced cause. As there was a factual issue evident the court ordered a hearing on the *Atkins v. Virginia*[1] issues of this claim. This Court, having considered the allegations contained in the instant Application for Writ of Habeas Corpus, all exhibits and testimony admitted at hearing, all subsequent documents admitted by agreed order, the trial court records and appellate records, and Respondent's Answer and its Supplemental Answer and exhibits submitted therewith, makes the following findings of fact and conclusions of law regarding Applicant Bobby Moore's allegation that he is a person with mental retardation:

---

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002)

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. The Applicant, Bobby James Moore, was formally charged by way of indictment May 13, 1980 in the 185th District Court in Harris County, Texas, with the offense of capital murder. (Clerk's Record Vol I-116)

2. Bobby Moore was convicted of capital murder and sentenced to death on July 15, 1980, after the jury answered the special issues. The jury convicted him as the shooter in a store robbery in which a clerk was shot to death. (CR I-116)

3. The original Writ of Habeas was received on August 8, 1983.

4. The Texas Court of Criminal Appeals affirmed Bobby Moore's murder conviction and sentence on direct appeal dated October, 10 1985. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985)

5. On August 10, 1999, The United States Court of Appeals for the Fifth Circuit granted Mr. Moore a new sentencing proceeding and the case was remanded to the trial court to either vacate his death sentence and impose a sentence less than death or conduct a new sentencing hearing. *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

6. The State chose to conduct a new sentencing hearing. Jury Selection began on January 9, 2001, and concluded on February 1, 2001.

7 Punishment proceedings commenced on February 6, 2001, and both sides rested and closed on February 12, 2001.

8. After hearing argument of counsel and receiving the trial court's instructions, the jury begin its deliberations on February 13, 2001 and ended on February 14, 2001 with special issues Number One and Two being answered on the affirmative and Special Issue Three (mitigation) in the negative.

9. The trial court thereafter sentenced Mr. Moore to death.

10. On March 30, 2001, Mr. Moore's motion for new trial was considered by the trial court and subsequently denied.

11. Application for post-conviction Writ of Habeas Corpus filed was filed on June 17, 2003.

12. Factual Supplement to Writ of Habeas Corpus was filed on November 14, 2011. An additional supplement was filed the week prior to the hearing.

13. On January 2nd and 3rd, a hearing for an Application for a Writ of Habeas Corpus was held before Hon. Susan Brown, Presiding Judge of the 185th District Court of Harris County,, 2014. Texas. This court ordered argument on findings for Thursday the 23rd of January

B. RISK FACTORS FOR MENTAL RETARDATION

14. Dr. Compton, the State's expert, noted that risk factors are an indication of mental retardation and that Mr. Moore had many risk factors present before the age of 18.

15. Etiology is conceptualized in the 11th edition of the AAIDD manual [2010 AAIDD MANUAL 58-62] as a multifactorial construct composed of four categories of risk factors that interact

across time, including across the life of the individual and across generations from parent to child.

16. The manual sets forth risk factors commonly associated with intellectual disability (mental retardation). The four categories of risk factors are: (1) biomedical: factors that relate to biologic processes, such as genetic disorders or nutrition; (2) social: factors that relate to social and family interaction, such as stimulation and adult responsiveness; (3) behavioral: factors that relate to potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse; and (4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills. [*Id.* at 126]

17. The second direction, which the manual sets forth, concerns the timing of the occurrence of causal factors according to whether these factors affect the parents of the person with ID, the person with ID, or both.

18. While the presence of risk factors does not guarantee that an individual has mental retardation, studies show that as many as 50 percent of the population of individuals with mental retardation have more than one causal risk factor. Further, mental retardation often reflects the cumulative or interactive effects of more than one risk factor. [*Id.* at 125] As the 2002 AAMR MANUAL emphasizes, "*The impairment of functioning that is present when an individual meets the criteria for a diagnosis of mental retardation usually reflects the*

presence of several risk factors that interact over time." [*Id.*]

19. However, it is important to note that the classification of an individual as intellectually disabled does not rely upon the identification of an etiology, for as the 2010 manual states: *"Even the most extensive and up-to-date genetic and biomedical testing will identify an etiology in less than half of all cases."*[2]

20. Due to the correlation between risk factors and mental retardation, it is relevant and material to determine whether Mr. Moore's history contains any of the risk factors for retardation identified by the AAIDD. Copious evidence from the family history witnesses in this case establishes that Mr. Moore was exposed to all four categories of risk factors and across all three time periods commonly associated with mental retardation. The presence of these risk factors lends further weight to this Court's finding of intellectual disability (mental retardation) in Mr. Moore's case.

1. PRENATAL

Biomedical

21. Chromosomal Disorders: The record reflects suspicion of Mr. Moore's mother [Marion Moore] and one sister possibly had an intellectual disability.

22. Poverty: Documents received from Mrs. Marion Moore[3] confirm what is consistently recalled

---

[2] Page 59 and see also, table on page, Fact Stipp. 60 TAB A

[3] BOX 8: Letter from Universal Capital Mortgage (11/11/1974; Handwritten note from Financial Assistance Corporation

from the Moore family and their acquaintances; Mr. Moore was brought up within a severely impoverished environment. Food was scarce, beds were underprovided[4], rent and mortgage payments were always late, heating was often not available in the winter, clothes were shared and the family lived in some of the most impoverished areas across all of the southern states.

23. Domestic Violence: There are many reports of Ernest beating Marion. There is no evidence to indicate that he was physically aggressive to Marion while she was pregnant with Mr. Moore, but the possibility should not be excluded; Ernest had a track record for hitting women. Clara Jean Baker recalls that her father, Ernest, *"Knocked the breath out of his own mother."*[5]

Behavioral

24. Parental Alcohol Use: Mr. Moore's father Ernest Moore Junior was known to be suffering from severe alcoholism. Ernest died prematurely in 1997 aged just 64 years and his death certificate[6] indicates that alcohol use contributed to his death. This objective evidence is supported by accounts from members of the Moore family, their friends, and neighbors, of

---

(11/21/1979) ; Letter from Mortgage Banque Inc (8/17/1976) ; Letter from Raymond G. Woodard (1/18/1977) ; Letter from Frost-Arnett Company (1/5/1981) TAB B

[4] Meeting with Bobby Moore 24th May 2000: pg 7546 7 TAB C

[5] Meeting with Moore family 03-16-00. pg 7645 TAB D

[6] BOX 8 TAB E

alcohol-induced rages and scenes of violence. It appears that Ernest was known to have a short temper and appeared to have started drinking from the early age of 13 or 14[7]. Larry Baker, who has known Mr. Moore since they were children, stated in his affidavit: "*We grew up in the same neighborhood. I saw Bobby's Father, Ernest Moore, and knew that Ernest suffered alcohol problems: Ernest would go on alcoholic binges and disappear for days. No one would ever know when or if Ernest would ever return*"[8] Clara Jean Baker stated: "*Bobby's father had alcohol problems... Bobby's father would go on alcoholic binges and would disappear for days on end.*"[9] Bobby's younger brother, Ronnie Moore, stated: "*My father was an abusive alcoholic and much of our poverty was due to him.*[10]" Lonnie Moore remembers that their father would come home drunk and they would find him lying drunk on the porch in the mornings. Some nights they would hear him coming down the street stumbling, falling and shouting / singing loud enough for the neighbors to hear also.[11]

---

[7] Meeting with Ernest Junior Moore's family 03-25-00. BOX 17 pg.7637 TAB F

[8] Affidavit of Larry Baker BOX 12 TAB G

[9] Affidavit of Clara Jean Baker BOX 12 TAB G

[10] Affidavit of Ronnie Moore BOX 12 TAB G

[11] Meeting with Lonnie Moore 02-28-00 BOX 17 pg 7674 TAB H

25. Parental Smoking: Ernest Moore Junior's death certificate[12] indicates that tobacco use contributed to his death.

Lack of Preparation for Parenthood

26. It is evident that Mr. Moore's parents had no preparation for the rigors of parenthood. Mrs. Marion Moore never sought prenatal care while pregnant and stayed with Ernest Moore, even though he beat her regularly. Meanwhile, Ernest Moore continued to drink, even with a child on the way, and did not in any way reduce his violently drunken behavior towards his wife and, later, Mr. Moore.[13]

27. Ernest Moore would strike Mr. Moore with a closed fist or an extension cord,[14] *"he [Ernest] would put our head through his legs to keep us in position so when he chastise us, he have a extension cord and had welps on us when it was all over with."*[15]

Educational

28. Parental Cognitive Disability Without Supports: It appears quite likely that Bobby's mother, Marion Moore, may also be mentally retarded. His eldest sister Clara Jean and her husband Larry Baker believed that Marion had a traumatic childhood during which she was not afforded much love or guidance and they agreed with the interviewer that Marion may well be

---

[12] BOX 8 TAB E

[13] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 10-11

[14] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 11, 13-15

[15] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 11, 13-15

retarded.[16] Marion's behavior is frequently recalled as being out-of-the-ordinary. According to the recollections of Clara Jean Baker, Marion responded to Ernest's violence towards her (see paragraphs 28-31, below) in a strange way which may well be indicative of mental retardation. Marion would not just sit or lie back and take it, but would further provoke Ernest into hitting her.[17] Marion held a deep distrust of doctors and medicine; upon being diagnosed with cancer of the uterus in 1976 believed that she was ill because of a 'Hoodoo Curse'[18]. She was mugged at a bus stop in February 2000 and although her purse was stolen, she retained her cards and social security number. Despite knowing this, and despite protestations from Clara Jean, Marion insisted on reporting to the bank and social security office that her cards had not been stolen. She was met with an appropriate degree of bemusement.[19]

PERINATAL

Biomedical

29. Neonatal Disorders: Mr. Moore believes that when he was first born, he was sick a lot and stayed very small when he was growing up because he was ill.[20] His mother, Marion, confirmed this and described a time when

---

[16] Meeting with Moore Family 03-16-00 pg. 7644 TAB D

[17] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[18] Meeting with Moore Family 03-16-00 pg 7648 TAB D

[19] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[20] Meeting with BM 25th May 2000: pg 7551 TAB C

Bobby had just started to crawl, "*We thought we might lose him*"[21]. At this time Bobby was suffering from severe diarrhea and dehydration. His younger sister Colleen, whose intellectual capacity is believed to be similarly limited, was also suffering from the same condition. Marion remembers taking both children to the hospital where their heads were shaved in order for needles to be inserted into cranial veins[22] -- it is, however, unclear from the records what this disorder might have been.

2. POSTNATAL

Biomedical

30. Traumatic Brain Injury: Around the date of 16th December 1971, Mr. Moore was hit in the left eye by a brick, which was thrown through the window of his school bus.[23] [24] Mr. Moore was also hit in the head with a chain, "*he got hit with a chain across his head, in his eye, it was bleeding, his mouth was busted and they was trying to pull him off the bus.*"[25] The bus was carrying black students and tensions were high because Scroggins Elementary was a predominantly Hispanic school. Bobby received treatment for his injury from Dr. Burman[26] and it is

---

[21] Meeting with Marion Moore 05/25/00 pg 7662 TAB I

[22] Meeting with Marion Moore 05/25/00 pg 7662 TAB I

[23] Meeting with BM of March 23, 2000. pg. 7526 TAB C

[24] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[25] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 40, 2-4

[26] Dr. Richard Burman's medical notes TAB J

highly possible that Bobby sustained a traumatic brain injury.

31. However, perhaps the most likely cause of a traumatic brain injury would be the very frequent beatings Mr. Moore received from his mother, father and brothers (see below).

32. Malnutrition: Due to the Moore family's extreme poverty, which was only exacerbated by Ernest Moore's alcoholism, Mr. Moore and his siblings would often go without eating. When they did eat it would be nutrient-poor staples such as rice, beans and cornbread.[27]

33. Between the ages of 5 and 6, Bobby only gained 1 lb.[28] -- a well-nourished child would normally gain 5 -- 7 lbs. per year. A medical report from 1965 -- when Bobby was only 6 - indicated that Bobby's nutritional status was poor[29]. By this point, Mr. Moore was about 6lbs underweight -- a very significant amount for a young growing boy. Mr. Moorer's younger brother, Ronnie Moore, recalled: *"There were nine children in our family. Bobby, like the rest of us, grew up in extreme poverty. I first remember us living in the Fifth Ward of Houston. When I was about eight or nine, we moved to the South Park area. There were many nights when we did not get to eat dinner because there just was not enough money to buy food. When we did eat it was usually something like pork-bones and corn bread and*

---

[27] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[28] pg 000853 TAB J

[29] pg. 000868 TAB J

stuff like that. My mother called it food that stretched a long way.... One time when I was about three or four Bobby and my sister Colleen were so hungry because we did not have any food, that they ate out of a neighbors [sic] trash can. They both got real sick, I think they got ptomaine poisoning."[30] Later in his life, when Bobby was approximately 13-14 years old and frequently being thrown out of the house, he was denied food by his father, who would tell the family: *"If any son of a bitch feed him tonight that he was going to get out, too, he was going to get them first."*[31] [32] [33]

34. Toxic-Metabolic Disorders: In late 1959 or early 1960, the Moore family moved to the 5th Ward area of Houston, Texas. This area, and others that the family subsequently moved to were notorious; not just for the poverty and violence, but for being contaminated with very harmful industrial waste.

35. On the 26th January 1999, environmental investigators accused a ship-channel area plating company [Ware Electro Plating at 630 Boyles] of allowing cyanide to foul a drainage ditch in a residential neighborhood. Mr. Moore attended Scroggins Elementary School and would have to walk past Ware Electro Plating to get to and from school. *"In 1996 ... the Texas Natural Resources Conservation Commission*

---

[30] Affidavit of Ronnie Moore TAB G

[31] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[32] Lonnie Moore Testimony 1-2-2014 volume 2 pg. 14. 7

[33] Larry Baker Testimony 1-2-2014 volume 2 pg. 105, 2

told Ware that dangerous levels of cyanide and cadmium had been found in drainage ditches around the company. Instead of paying the $500-a-barrel cost of disposing of the cyanide and cadmium safely, Walsh said (Sgt. Michael S. Walsh of the Houston Police Department) *the company simply let it drain into a ditch alongside the building. 'This is one of the worst sites I've seen for environmental violations,' Walsh said. 'They have a total disregard for public health. And I mean a total disregard' Stephanie Lopez, who lives not far away, was unhappy because her 10-year-old daughter attends Scroggins Elementary School on Boyles and walks past Ware Electro Plating going to and from class."*[34]

36. Later that same year, on March 8th 1999, Mayor Lee Brown inspected a cleanup of lead-contaminated soil in the fifth ward neighborhood. The Moore family lived in this neighborhood from 1959 until 1972. *"The Texas National Resource Conservation Commission identified 86 homes as having total lead concentrations in the soil of 500 parts per million, a potential health hazard to residents, especially children... The 86 homes are located near the closed Many Diversified Interests facility at 3618 Baer Street... The facility*

---

[34] *"Authorities say plating company letting cyanide foul ditch / Firm located near a Ship Channel-area residential neighbourhood"* Houston Chronicle 01/27/99 Section A, Page 17; Edition: 3 Star. TAB K

operated as a steel casting company from 1926 to 1992"[35]

Social

37. Impaired Child-Caregiver Interaction: Marion Moore, Mr. Moore's mother, was rarely at home due to her being both a domestic (cleaner) and working in a day care center. Bobby's father tended to be either at work, drunk or with friends. Ernest was a construction worker and would work away from home for long periods of time. However, even when he worked locally, the family would not see him for several days after he had been paid because he would go on an alcoholic binge.[36] [37] As such, there was very little supervision of the children. When Bobby was still only a child, aged 14, he was thrown out of the family house and was never allowed to return: *"Bobby was forced to leave home when he was about fourteen. I remember that my father was beating on my mother, I was in the back room with the other younger kids. My mother would try and hide us in the back room when my father was on a rampage. I could hear the fighting in the other room. I heard Bobby tell my father to stop beating on my mother. My father started cursing Bobby out and told him to*

---

[35] *"Mayor Brown Inspects Clean Up of Lead-Contaminated Soil From 86 Fifth Ward Homes"* Mayor's Office Home Page March 8, 1999 TAB K

[36] Affidavit of Larry Baker BOX 12 TAB G

[37] Anthony S. Haughton's interview with Bobby Moore 11-4-91 BOX 12 TAB C

get out of the way and then told him to get out of the house. Bobby never lived at home again."[38]

38. Family Poverty: Please see above

Behavioral

39. Child Abuse and Neglect: Mr. Moore's father, Ernest, physically terrorized the family but picked on Mr. Moore most of all.[39] *"He would beat Bobby with his fists, electrical extension cords, peeled tree branches, or anything else that came to hand. He very often left marks, welts, and other bruises. At the worst times Bobby was beaten daily, and a couple of times a week at best"*[40] Ronnie Moore recalls: *"I remember hearing Bobby screaming and crying for my dad to stop beating him, but it did not make a difference."*[41] Colleen D: McNese, Mr. Moore's younger sister, recalls: *"He [Ernest] would beat up on [Bobby] without any cause. He would beat Bobby with his fists, slap him across the face, and regularly used an extension cord to whip him with. He beat Bobby so bad with that cord that he still has the marks on his body.*[42]" Mr. Moore's mother, Marion, used to beat him just as hard as Ernest did. It appears that while Ernest would beat the family when he was drunk, it was Marion who would beat the children for disciplinary purposes: *"Mum was*

---

[38] Affidavit of Ronnie Moore BOX 12 TAB G

[39] Affidavit of Colleen D. McNese TAB G

[40] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[41] Affidavit of Ronnie Moore TAB G

[42] Affidavit of Colleen D. McNese TAB G

really into discipline, she looked like she had no mercy, she did it to the boys most... she would tell them to take their shorts off... it felt like she was taking her frustrations out on them."[43] She would use an extension cord to whip the children and on one occasion, Mr. Moore remembers that blood from his back was spraying across the wall of the home with every lash of the cord.[44] Marion told an interviewer that: *"A child must really feel the whooping or it's not worth it because they will do it again*[45]*."* Mr. Moore's brothers, Jessie, Charles and Lonnie, would also beat him regularly when he was growing up. They too would hit him with things, often in the head: he was left bruised and injured from the many beatings they gave him.[46]

40. Domestic Violence: Colleen McNeese, Mr. Moore's younger sister, remembers that their father would frequently physically abuse their mother: *"He beat her one time with a broomstick. He had it on her neck and she was begging him because she couldn't hardly breathe."*[47]

41. Ronnie Moore, Mr. Moore's younger brother, recalled: *"He [Ernest] would get uncontrollably mad at the slightest little thing. When he got*

---

[43] Meeting with Clara Jean Baker 05-27--00 pg 7654 TAB L

[44] Meeting with Bobby Moore March 23, 2000., pg 7526 TAB C

[45] Meeting with Marion Moore 05/27/00 pg 7664 TAB I

[46] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[47] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

mad at my mother he would beat her in front of us."[48]

42. Mr. Moore recalled that on one occasion he came home to find his father threatening his mother with a handgun - a .22 or .32 caliber pistol. He further recalls that shortly after his release from prison in July 1979 he returned to the family home to find his father threatening his mother with a knife.[49]

43. Clara Jean recalls memories from her childhood when, as well as the usual punching and slapping of Marion, she would see her father pin Marion down on the floor, or on the bed, with his body while Marion would be screaming.[50] It is possible that Clara Jean may have been unknowingly witnessing the rape of her mother by her father.

44. Clara Jean recalls another incident in which Marion and Ernest were fighting outside the house; Marion was in a ditch and Ernest was kicking her.[51]

45. A doctor's note from July 4th 1972, details injuries sustained to Marion after she *"fell down flight of stairs 3 days ago"*[52]. It is important to note that, at that time, there were no stairs in the Moore household.

---

[48] Affidavit of Ronnie Moore TAB G

[49] Meeting with Bobby Moore February 11, 2000., pg 7523 TAB C

[50] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[51] Meeting, with Clara Jean Baker 05-27--00 pg 7653 TAB L

[52] Dr. Richard Burman's medical notes pg 4072 TAB U

46. Violence was pervasive, constant feature of family life in the Moore household. Clara Jean recalls that sometimes when her father came home drunk and fell asleep, Marion would hit him with a baseball bat.[53]

47. Just one sibling, Lonnie Moore, estimates to have personally witnessed between 50 and 100 instances of domestic violence.[54]

48. Social Deprivation: Social deprivation -- including the lack of a nonviolent surrounding community -- is a behavioral risk factor for mental retardation. This risk factor was present in Mr. Moore's young life as a result of the violence that pervaded the 5th Ward in Houston when he was a child.

49. Drug use: Drug use is a behavioral risk-factor for mental retardation. In 1971, when Mr. Moore was aged 11, he began to abuse drugs: sniffing glue and smoking marijuana.[55] By the time Mr. Moore was 15 or 16, he was taking more drugs.[56] [57]

Educational

50. Impaired Parenting: Ernest Moore had no interest in Mr. Moore's school work most of the time, *"I want to say there is not a interest or was not a concern because he didn't have education, so he couldn't realize what was good or what was bad.*

---

[53] Meeting with Clara Jean Baker 05-27--00 pg 7653 TAB L

[54] Meeting with Lonnie Moore 02-28-00 pg 7674 TAB H

[55] Interview with BM 25th May 2000: pg 7552 TAB C

[56] Interview with BM 25th May 2000: pg 7552 TAB C

[57] Meeting BM October 10 2000: pg. 7623 TAB C

He didn't put interest in that."[58] Only when teachers from Mr. Moore's elementary school approached Ernest Moore about Mr. Moore's learning deficiencies did Ernest Moore a negative interest, *"And my dad would particularly get mad if someone from the school would come to the house to tell him that he needed some assistance and my dad, I remember, he ran the teacher away from the house. She only came because she had concerns trying to help Bobby and my dad wouldn't allow her to come in the house. So he never got the help that he really needed."*[59]

51. Inadequate special education services: Records from Mr. Moore's life indicate that those people involved in his education were keenly aware that Mr. Moore suffered from some form of condition; some believed it to be mental retardation, but others simply thought it was due to emotional issues. Mr. Moore was tested very frequently, more so than the average child, and as a result was sent to summer school and received various other extra-curricular supports.

52. The fifth assumption of the current AAIDD definition[60] states that *'With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve.'* Due to the consistency of Mr. Moore's IQ scores over a 20 year period, and supporting evidence as to the validity of these scores, it appears that whatever help the

---

[58] Lonnie Moore Testimony 1-2-2014 volume 2 pg. 14, 22-25

[59] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 34, 4-10

[60] AAIDD pg. 7

education system did provide for Mr. Moore, it was simply inadequate.

53. Perhaps due to the nature of those times, and the fact that mental retardation was not as well understood as it is today, the teachers would tend to keep Mr. Moore occupied with menial activities such as drawing while the rest of the class continued with the curriculum.

54. Other teachers would simply ignore Mr. Moore, an out of sight, out of mind approach was used, "They didn't really try to help him anyway at school because they would sit him in the hallway, said that he was stupid because he didn't know how to read."[61]

55. Further, it appears from the records that, despite various scores consistently identifying his poor academic performance, Mr. Moore was only sent to a special summer school once.

56. When teachers from the elementary school actually did approach the Moore family to lend special assistance, the teachers were rebuked by Ernest Moore, *"...my dad came behind her and he wouldn't accept talking to her because he said Bobby is having -- he'd use the "stupid" word and he said that the school is aware of it, it's not like y'all trying to help him [Bobby] so don't keep bothering us, and he just slam the door. So at that time nobody else came back there."*[62]

57. **Inadequate Family Support**. The lack of family support in Mr. Moore's life is demonstrated by

---

[61] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 35, 9-11

[62] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 61, 6-12

his family's inability to protect him from the violence of his parents and siblings, and their inability to advocate for better educational services while he struggled in school. Repeatedly, Mr. Moore was abandoned when he was faced with violence at the hands of Ernest Moore or deprivation through being forced onto the streets; and no family member ever inquired into why he was having so much trouble in school. Poverty, illiteracy, alcoholism, cognitive impairments and general ignorance likely diminished the family's ability to advocate for Mr. Moore.

C. THE GUIDING LEGAL STANDARD

58. In determining whether Mr. Moore has mental retardation, the Court has been guided by the clinical definitions of mental retardation developed by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA"). Each organization recognizes that mental retardation is a disability characterized by (l) "significantly subaverage" general intellectual functioning, (2) accompanied by "related" (AAMR) or "significant" (APA) limitations in adaptive functioning, (3) the onset of which occurs prior to the age of 18. AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010); APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)

59. In *Atkins v Virginia* 536 U. S. 304 (2002), the Supreme Court of the United States construed and applied the Eighth Amendment - prohibiting

cruel and unusual punishment - in light of our "*evolving standards of decency*", to conclude that the execution of mentally retarded persons is excessive punishment; and the Constitution "*places a substantive restriction on the State's power to take the life*" of a mentally retarded offender. *Ford*, 477 U.S. at 405.

60. The Supreme Court, in *Atkins*, noted that neither of the two justifications for the death penalty, recognized in *Gregg v Georgia*, 428 U.S. 153, 183 (1976) -- retribution, and deterrence of capital crimes by prospective offenders -- may apply to mentally retarded offenders. It was stated that, "*unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.*" *Enmund*, 458 U.S. at 798.

61. Retribution -- "'the interest in seeing that the offender gets his 'just deserts'" -- is a principle which the Court in *Atkins* recognized as necessarily depending upon the culpability of the offender. The court recognized the narrowing jurisprudence in which only the most deserving of execution are put to death. As such, and in light of their deficiencies which diminish their personal culpability, the Court ruled that exclusion for the mentally retarded was appropriate.

62. As the Supreme Court eminently noted, it is these very same cognitive and behavioral impairments that make the mentally retarded less morally culpable, which also make it less

likely that they can process information regarding the possibility of execution as a penalty and, as a result, are less able to regulate their conduct based upon that information.

63. The deficits of the mentally retarded -- a diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control responses -- are the very same traits displayed by young children; and, as with children, they are less able to grasp the morality and legality of their actions, and less able to arrest their impulses, despite being aware of the punishment, which of itself will be but a distant and unconnected threat.

64. In the Supreme Court's proportionality review, in light of evolving moral standards, it was noted that *'to the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.'* The Supreme Court reiterated their prior approach in *Ford v Wainwright*, with regard to insanity, *"we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."* 477 U.S. 399, 416-417.

65. In *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), the Court of Criminal Appeals held that Texas should adopt the *"AAMR three part definition of mental retardation"* in the "Persons With Mental Retardation Act" (citing *Ex parte Tennard*, 960 S.W.2d 57, 60 (Tex. Crim. App. 1997) and HEALTH & SAFETY CODE §§ 591.003(13) & (16)). The Court then applied

that definition in determining whether the applicant presented sufficient evidence of mental retardation.

66. As our standards of decency evolve, so too do the standards of psychological diagnosis. The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). In 2010, the AAIDD published the 11th edition of their manual, which began to refer to mental retardation as intellectual disability. It should be stressed however, that the term 'Intellectual Disability' covers the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type, and duration of the disability; every individual who is or was eligible for a diagnosis of mental retardation is eligible for a diagnosis of Intellectual Disability.

67. The Eleventh edition manual from the AAIDD provides the following definition of Intellectual Disability.

"Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18. The following five assumptions are essential to the application of this definition:

1. *Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.*

2. *Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.*

3. *Within an individual, limitations often coexist with strengths.*

4. *An important purpose of describing limitations is to develop a profile of needed supports*

5. *With appropriate personalized supports over a sustained period, the life functioning of the person with intellectual disability generally will improve."*

AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010)

68. Each component of the definition of mental retardation requires additional explanation:

69. **Limitations in Intellectual Functioning.** Whereas several jurisdictions have interpreted their appropriate statutes as intending for there to be a strict IQ score cutoff of 70 (notably, Florida[63], Kentucky[64] and Tennessee[65]), Texas is noted for its absence of any legislation which implements the Atkins decision and there is therefore no legislative bright-line for IQ scores. Instead it relies on the ruling in *Ex parte*

---

[63] *Jones v State*, 966 So.2d 319, 329 (Fla. 2007) -- however, the US Supreme Court is due to decide whether such a bright-line cut off is constitutional and in accordance with *Atkins v Virignia*, 536 U.S. 304 n.3 (2002)

[64] *Bowling v Commonwealth*, 163 S.W.3d 361, 374-75 (Ky. 2005)

[65] *Howell v State*, 151 S.W.3d 450, 458 (Tenn. 2004)

Briseño in which the Texas Court of Criminal Appeals (TCCA) wisely decided to follow the AAMR definition of mental retardation: *"Until the Texas Legislature provides an alternative statutory definition of "mental retardation" for use in capital sentencing, we will follow the AAMR or section 591.003(13) [Texas Health and Safety Code] criteria in addressing Atkins mental retardation claims.*[66]*"* *Ex parte Briseño*,135 S.W.3d 1, 8 (Tex. Crim. App. 2004) (as discussed above, the AAMR has changed its name to the AAIDD however, the definition for the disorder is largely identical; any changes in the definition reflect the current accepted scientific definition as compiled by the leading authorities on intellectual disabilities).

70. As recently as 2008, the Texas Court of Criminal Appeals has reaffirmed the position they took in *Briseno*, with the case of *Williams v State, "We have adopted the American Association on Mental Retardation (AAMR) definition of mental retardation for Atkins claims presented in Texas death penalty cases."* *Williams v. Texas*, 270 S.W.3d 113 (Tex. Crim. App. 2008)[67]

71. In 2010, the Texas federal district court in *Maldonado v Thaler* reaffirmed their wise rejection of 70 as cutoff and stated *"While Texas has not established 70 as a bright-line standard, it has not expressly adopted another score as the*

---

[66] *Ex parte Briseno*,135 S.W.3d 1, 8 (Tex. Crim. App. 2004)

[67] *Williams v. State*, 270 S.W. 3d 112, 113 (Tex. Crim. App. 2008)

retardation threshold either.[68]" *Maldonadao v. Thaler*, 662 F. Supp. 2d 684, No. H-07-2984 (S.D. Tex., Sept. 24, 2009) (slip copy at 36). aff'd., 625f. 3d 229 (5th Cir. 2010).

72. Noting also, the Supreme Court's acknowledgement of the AAMR definition of intellectual function in Atkins that "*mild mental retardation is typically used to describe people with an IQ level of 50-55 to* ***approximately*** *70.*[69]" (Emphasis added), this Court is satisfied that the reasonable interpretation of *Atkins* and *Briseno*, requires the presentation of evidence that identifies the applicant's intellectual deficiencies as defined by the then AAMR, which is now the AAIDD.

73. The AAIDD provides the requirement that for a positive diagnosis of mental retardation, an IQ score should be "*approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations.*[70]"

74. The APA's DSM-IV-TR[71] requires "*significantly sub average intellectual functioning*" and states that, "*it is possible to diagnose Mental Retardation in individuals with IQs between 70*

---

[68] *Maldonadao v. Thaler*, 662 F. Supp. 2d 684. No. H-07-2984 (S.D. Tex., Sept. 24, 2009) (slip copy at 36), aff'd., 625f. 3d 229 (5th Cir. 2010).

[69] *Atkins v Virginia*, 536 U.S. 304 n.3 (2002)

[70] AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010)

[71] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)

and 75 who exhibit significant deficits in adaptive behavior."

75. The APA's DSM-V raises it to 75 (an IQ of 75 places one at approximately the 5th percentile).

76. On a recently normed and widely accepted test -- such as the Weschler Scales -- administered under perfect conditions, the average IQ score for the population would be approximately 100 and one standard deviation is 15. Therefore, a score of two-standard deviations below the mean would equate to an IQ score of **approximately** 70.

The Standard Error of Measurement (SEM)

77. The AAIDD's instruction to consider *'the standard error of measurement*[72]*'* is a reference to the fact that any IQ score is subject to variability, as a function of a number of potential sources of error and, thus, a variation in scores may or may not represent the individual's actual or true level of intellectual functioning. The standard error of measurement is used to quantify this variability and provide a stated confidence interval within which the person's true score falls. The AAIDD manual states that *'for well-standardized measures of general intellectual functioning, the standard error of measurement is approximately 3-5 points*[73]*.'* The manual further advocates, *'understanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision*

---

[72] AAIDD ref to consider the SEM

[73] AAIDD pg 36

concerning a diagnosis of ID (Intellectual Disability) *that is based, in part, on significant limitations in intellectual functioning. Both the AAIDD and the American Psychiatric Association (2000) support the best practice of reporting an IQ score with an associated confidence interval.'* The APA's DSM-IV-TR states that *"It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g. a Weschler IQ of 70 is considered to represent a range of 65-75)".*

78. **This Court joins with the inventors of IQ tests such as the Weschler, in recognizing that IQ tests are not designed to - nor are they able to - produce a single and precise figure; but rather it is appreciated that an IQ test result is best conceptualized as a range of scores.**

79. This Court has recognized the TCCA's past use and acceptance of the standard error of measurement (SEM) in *Ex parte Hearn*, in which they cited with approval *Wilson v Quarterman, "There is "a measurement error of approximately 5 points in assessing IQ," which may vary from instrument to instrument. [8] Id. Thus, any score could actually represent a score that is five points higher or five points lower than the actual IQ." Ex parte Hearn*, 310 S.W.3d 424, 426-27 (Tex.Crim.App. 2010) *Wilson v. Quarterman*, 2009 WL 900807 *4 (E.D.Tex. Mar. 31, 2009)

80. In *Lizcano v State* (Unpublished), The State contended on appeal that the standard error of measurement was plus or minus five points and

therefore five points should be added to the applicant's IQ scores. However, the TCCA held that *'The State's contention[s] have very little merit... the State presented no evidence showing why the standard error of measure of five points should be added to the appellant's score rather than subtracted from it or even ignored, particularly in light of the testimony from Dr. Compton that the multiple scores below 70 increased her confidence in the validity of the scores.'*

81. This court is duly observant of the TCCA's line of reasoning in *Lizcano* and further, notes the wisdom of its reasoning:

    a. Firstly, it serves to uphold the Atkins direction that States should develop an *appropriate* way to enforce the restriction on executing the mentally retarded;

    b. Secondly, it recognizes the slippery slope which a contrary decision might have created -- namely that there would be a presumption against an applicant's status as mentally retarded when they have IQ scores above 66, rather than the accepted Atkins and AAIDD definitions;

    c. Thirdly, it is in line with directions from the AAMR manual -- which was available to the Supreme Court in Atkins -- which states, *'Where the existence of intellectual limitations is uncertain or unequivocal, the decision should be made that would result in services that*

would be most advantageous to the individual.[74]'

d. **Fourthly, the principle behind the *Atkins* decision is to prevent the cruel and unusual punishment of those with mental retardation. The standard error of measurement represents the scope of the range of IQ scores within which the Defendant's IQ score resides. The TCCA was right to appreciate that to execute all those with an IQ score anywhere within the range of SEM, would create an unacceptable risk of the unconstitutional killing of those suffering from mental retardation.**

The Flynn Effect

82. **The AAID manual also indicates the importance of including other psychometric statistical adjustments; which may have a profound effect upon the applicant's true IQ score. Of particular significance is the Flynn Effect; of which the manual states the following:**

> *"The Flynn Effect refers to the observation (Flynn, 1984*[75]*) that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time... Flynn reported that mean IQ increases about 0.33 points per year"*[76]

83. **The manual advocates that best practice requires recognition of a potential Flynn Effect**

---

[74] **AAMR Definition Manual (9th Edition) at 14.**

[75] **Flynn 1984 TAB A**

[76] **AA1DD pg 37 TAB A**

when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score.

84. This Court however, recognizes that same truth which was stated in *Hall v Quarterman*,[77]: Federal courts cannot commit the ultimate decision of mental retardation to the experts alone. The Flynn Effect was neither considered by the Supreme Court in Atkins, nor by the Texas Court of Criminal Appeals in *Briseno*. The Court, in *Neal v State*, described the Flynn Effect as *'an unexamined scientific concept,* [78]' but it also said, *'this court has never specifically addressed the validity of the Flynn Effect. Nor will we attempt to do so now.' Neal v. State*, 256 S.W.3d 273 (Tex. Crim. App. 2008)

85. However, at this time, the Flynn Effect had been examined by other courts. Most notable amongst them is an authority no less than the US Navy-Marine Corps Court of Criminal Appeals, in the case of *United States v Parker*,[79] The Court held *'We adopt the definition of mental retardation from the American Association on Intellectual and Developmental Disabilities as it applies to the imposition of the death penalty in the Navy and Marine Corps. In determining whether an offender meets this definition, standardized IQ scores scaled by the SEM (standard error of measurement) and the*

---

[77] *Neal v. State*, 256 S.W.3d 273 (Tex. Crim. App. 2008)

[78] By which it meant that the scientific concept had not been examined by a court.

[79] *United States v. Parker*, 65 MJ 626,629-30 (N-M. Ct. Crim. App. 2007)

Flynn effect will be considered, along with evidence of the offender's adaptive functioning ability, and onset of the mental retardation before the age of 18.' United States v. Parker, 65 M.J. 626, 629-30 (N-M. Ct. Crim. App. 2007)

86. Further, all of the experts who contributed to this hearing -- both for the defense and the prosecution -- were guided in their assessments by their acceptance of the Flynn Effect as a vital tool in the diagnosis of mental retardation.

87. In light of the aforementioned, this Court will present the applicant's evidence of limitations in intellectual functioning, in three formats: as unadulterated scores; adjusted to give a bracket of scores, guided by the SEM; and adjusted to take into account of the Flynn effect at the rate of 0.33 points per year -- as advocated by the AAIDD manual.

Practice Effects

88. The AAIDD manual provides professional guidance on the practice effect: *"The practice effect refers to gains in IQ scores on test of intelligence that result from a person being retested on the same instrument... established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence"*[80]

89. Lichtenberger and Kaufman (2006)[81] state that *"Practice effects on Wechsler's scales tend to be*

---

[80] AAIDD pg 38

[81] Assessing Adolescent and Adult Intelligence (2006 edition)

profound, particularly on the performance scale ...The impact of retesting on test performance, whether using the WAIS-III, WAIS-R other Wechsler scales, or similar tests, needs to be internalized by researchers and clinicians alike. Researchers should also be aware of the routine and expected gains of about 2 ½ points in V-IQ [Verbal] for all ages between 16 and 89 years. They should also internalize the relatively large gain on P-IQ [Performance] for ages 16-54 (about 8 to 8 ½ points)."

90. **Limitations in Adaptive Functioning:** With respect to adaptive functioning, the AAIDD definition requires *"performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without ID that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills"*. The APA definition requires that the limitations in adaptive functioning encompass at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health, safety, functional academics, leisure, and work.

91. The Texas Court of Criminal Appeals in *Briseno*, provided seven *'other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder.'*

92. This Court is satisfied that it was the intention of the Texas Court of Criminal Appeal (TCCA) to provide guidance to those factfinders who would be presented with similar facts as in *Briseno*; where evidence had been presented that the applicant suffered from Anti-Social Personality Disorder rather than Mental Retardation. This Court is encouraged by a recent ruling from the TCCA in which it held, *'In addition to demonstrating that one has subaverage intellectual functioning and significant limitations in adaptive functioning, he or she must demonstrate that the two are linked -- the adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder. To help distinguish the two this court has set forth evidentiary factors that "fact-finders in the criminal trial might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder." Briseno, 135 S. W.3d at 8' (Ex parte Yokamon Laneal Hearn, 2010*[82])

93. This Court is further satisfied that it may treat the *Briseno* factors as discretionary, by the acceptance of such a position by the Fifth circuit in *Moore v Quaterman*.[83]

94. This Court has not found it necessary to directly consider these extra *Briseno* factors, as at no point during the case's 34 year history has the prosecution -- nor indeed any other interested

---

[82] *Ex parte Hearn*, 310 S.W.3d 424, 426-27 (Tex. Crim. App. 2010) Wilson v. Quarterman, 2009 WL 900807 *4 (E.D.Tex. Mar. 31, 2009)

[83] *Moore v. Quarterman*, 454 F.3d 484, 498 (5th Cir.2006)

party -- ever alleged that Mr. Moore suffers from Anti-Social Personality Disorder. This Court must therefore assess Mr. Moore's adaptive deficits based entirely upon the stipulations provided in the AAIDD manual.

95. Nevertheless, despite this Court not explicitly considering the *Briseno* factors, our thorough investigation of facts based upon the AAIDD definition did consider evidence which implicated, and indeed answered, many of the *Briseno* factors.

96. **Age of Onset.** Third, with respect to the requirement that the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of 18, it is not required that there be a diagnosis of mental retardation before the person's eighteenth birthday. Rather, it is necessary only that the limitations in adaptive functioning be apparent before the age of 18, that IQ testing sometime during the person's life reliably establish an IQ of 75 or below,[84] and that there be no

---

[84] The consensus among mental health professionals is that a full-scale IQ of 70 or below satisfies the requirement of significant limitations in intellectual functioning. IQ tests are considered not to be perfectly accurate, however, because of "variations in test performance, examiner's behavior, or other undetermined factors." 2002 AAMR MANUAL, at 57. Accordingly, a "standard error of measurement" must be taken into account in interpreting the IQ score obtained on any test. *Id.* The standard error of measurement is the range of IQ scores within which there is a high level of confidence that a person's "true" IQ resides. *Id.* Thus, obtained IQ scores up to 75 can satisfy the first component of the definition of mental retardation, for the true IQ score of a person who obtains a score of 75 is within the range of 70-80.

intervening reason, such as a traumatic head injury, for the person's IQ to have diminished since the age of eighteen.

97. Accordingly, the Court has dutifully relied on the 11th edition of the AAIDD definition of mental retardation to determine whether Mr. Moore has mental retardation.

D. DIAGNOSTIC EXPERTS

98. **Dr. Richard Garnett** has thirty-five years of professional experience working with people with mental retardation. During that time he has served as a psychologist, diagnostician, counselor, therapist, juvenile probation officer, and a consultant and trainer within the field. He holds Bachelors, Masters and Doctorate degrees in Psychology and has served on committees and Boards of Directors for local, state, and national organizations that serve or represent people with mental retardation. He is certified and licensed as a psychologist in the State of Texas. Dr. Garnett is a past president of the Texas Association on Mental Retardation, and a current member of the Mental Retardation Public Advisory Council for the Texas Department of MHMR. He was recently re-appointed by Governor Perry to the Board of Directors for the Interagency Council on Autism and Pervasive Developmental Disorders. He has interacted with hundreds of people with

---

See Atkins v. Virginia, 536 U.S. at 309 ("an IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition").

mental retardation, and has evaluated a number of defendants for mental retardation.

99. **Dr. Robert P. Borda** is a clinical neuropsychologist who has been in private practice since 1985. He holds a bachelor's degree from Princeton, a masters and a doctorate in Physiology from Baylor College of Medicine, and a second doctorate in Psychology from the University of Houston. He is certified and licensed as a psychologist in the State of Texas. Dr. Borda specializes in the administration of a battery of tests to people who are thought to have a mental or emotional impairment in order to determine whether the results are suggestive of neurological or psychiatric disorders. In addition to his private practice in clinical neuropsychology, Dr. Borda has also served as an expert witness for the Social Security Administration (SSA) disability claims which have been appealed. He testifies as a medical expert in the area of mental disorders, and frequently will be asked to determine if the claimant meets the criteria for mental retardation which have been established by the SSA. Dr. Borda is a member of the American Psychological Association and the National Academy of Neuropsychology, and was one of the founding members of the Houston Neuropsychological Society. He has been certified by the American Board of Professional Disability Consultants.

100. **Dr. Stephen Greenspan** is a retired professor from the University of Connecticut where he was professor of educational psychology; and he now has a clinical appointment at the University of Colorado, in the department of

psychiatry; and he also has a consulting practice around mental retardation and particularly in forensic settings such as this. Dr. Greenspan has a PhD in developmental psychology from the University of Rochester and a postdoctoral fellowship in mental retardation and developmental disabilities from UCLA Neuropsychiatric Institute in the medical school. He has held a number of academic and research positions, specifically at: George Peabody College for Teachers of Vanderbilt University, the Boys Town Center for the Study of Youth Development and the University of Nebraska, the University of Connecticut (where he remains Emeritus Professor of Educational Psychology) and the University of Colorado (where he is Clinical Professor of Psychiatry). Dr. Greenspan has also been published numerous times in the area of mental retardation, particularly around diagnostic issues in an Atkins case setting. Dr. Greenspan has co-authored four chapters of the American Association for Intellectual and Developmental Disorders (AAIDD) handbook titled *Determining Intellectual Disability for the Courts: Focus on Capital Cases*. He is also in the process having a paper published in the Journal Current Opinion in Psychiatry. It was an invited paper on the DSM-V and the paper's main focus is issues of diagnosing intellectual disability. Dr. Greenspan is also coeditor of a book titled, *What is Mental Retardation*, which is widely cited.

101. **Dr Shawanda Williams-Anderson** is neuropsychologist who specializes in Traumatic Brain Injuries and brain anomalies. Dr. Anderson

earned her bachelor's degree from Dillard University in New Orleans and also earned her master's degree from Northwestern State University. Dr. Anderson earned her doctorate in clinical psychology from Jackson State University. She has also taught at Prairie View A&M University for four years and then proceeded to work for the Mental Health Mental Retardation Authority of Harris County. Dr. Anderson is currently in private practice, in which her primary focus is Neuropsychology with adolescents, children, and the geriatric population. She is an expert in administering tests for diagnosing traumatic brain injuries.

102. **Dr Kristi Compton** is a clinical and forensic psychologist. Dr. Compton earned her M.A. and Ph.D. in clinical psychology from Wichita State University. She has been licensed to practice for 14 years in Kansas and in Texas. She has experience working with inmates at the El Dorado Correctional Facility (Maximum Security Unit) in Kansas. Presently she has a private practice in Dallas in clinical and forensic psychology. Dr. Compton specializes in mental state of the time of the offense evaluations, competency to stand trial, diminished capacity and sex offender risk assessment. She has been an expert witness over 70 times and has performed of 3,000 forensic evaluations. Dr. Compton also currently teaches forensic psychology at the University of Texas-Dallas. She has been published in the *Journal of Prevention and Intervention in the Community*, the *Journal of Drug Education*, and *Development and Psychopathology*. She is a member of the

American Psychological Association and Texas Psychological Association, as well as a board member of Dallas Challenge.

E. THE DETERMINATION OF MR. MOORE'S INTELLECTUAL FUNCTIONING

103. Mr. Moore's IQ scores establish that he has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning.

104. From 1971 through 1989, Mr. Moore completed a total of seven tests of intellectual ability, several of which were administered by licensed professional psychologists.

105. In 1971, Mr. Moore obtained an IQ score of 77 on the OTIS-LENNON MENTAL ABILITIES TEST[85] [86].

106. In 1972 the Houston Independent School District (HISD) administered the SLOSSON INTELLIGENCE FOR CHILDREN on Mr. Moore and he was evaluated to have an **IQ of just 57** and a mental age of only 7.5 years -- despite being 13.1 years old.[87]

107. In 1973, Mr. Moore was administered a battery of tests by Marcelle Tucker, N.Ed., Consultant. Mr. Tucker reported that Mr. Moore obtained the following WECHSLER INTELLIGENCE SCALE FOR CHILDREN (WISC) scores:

---

[85] ELEMENTARY TEST RECORD pg 000864 TAB J

[86] Iowa Test of Basic Skills: pg 000850 TAB J

[87] ELEMENTARY TEST RECORD pg 000864 TAB J

Verbal Scale IQ:	77 (borderline range)
Performance Scale IQ:	83 (dull normal range)
Full Scale IQ:	78 (borderline range)

108. As part of the test battery, Mr. Moore was administered a BENDER VISUAL MOTOR GESTALT TEST which reported his mental age as 8 years, 11 months. By dividing his mental age by his chronological age (13 years, 3 months) Dr. Garnett was able to estimate Mr. Moore's IQ to be **67**.

109. The final test in the battery was the GOODENOUGH DRAW-A-MAN TEST. It is reported that Mr. Moore was predicted to have a mental age of 9 years and 6 months. Using the same calculation as above, Dr. Garnett was able to predict Mr. Moore's IQ to be **72**.

110. In 1984 a psychological evaluation was conducted on Mr. Moore, by the unit psychologist, George B Wheat, at the request of the Psychological Screening Committee *'to assist in evaluating this death row inmate for work capable status.'* Mr. Wheat reports that *'his* [Mr. Moore's] *responses were appropriate to his 9th grade educational level and indicated IQ of 71'*. As part of his conclusion, Mr. Wheat again makes a specific reference to Mr. Moore's intelligence level: *'Considering inmate Moore's background, intellectual functioning, and' current Death Row status, he has adjusted guile well.'*

111. In 1989, Dr. Majors conducted intelligence screening on Mr. Moore using an abbreviated form of the WECHSLER ADULT INTELLIGENCE

SCALE -- REVISED (WAIS-R). Dr. Majors reported an IQ score of 71 and estimated that Mr. Moore fell within the Borderline retarded range. The following day, Mr. Moore was given the Full-Scale WAIS-R and obtained the following scores:

Verbal Scale IQ:	74
Performance Scale IQ:	76
Full Scale IQ:	74

112. Dr. Majors committed an error in scoring on the Digit Span subtest of the WAIS-R. He reported a raw score of 7, and then incorrectly put a scaled score of 5, when the correct scaled score should be 4. The correction of this error means that the scaled score for Verbal Tests is now 32, rather than 33. With reference to the WAIS-R manual, the accurate full scale score should actually be one point lower, which equates to a full scale IQ score of 73.

113. The full scale IQ score is likely to be affected by practice effects from the test administered one day prior. The accepted adjustment to account for practice effects is discussed in more detail above -- paragraphs 48 and 49.

114. According to the information in paragraphs 48 and 59, one might reasonably have expected the Mr. Moore's scores to have increased by even more than two points; however, due to the substantial deficit in his intellectual functioning, it appears that he was unable to learn fast enough to increase his IQ score further, the following day.

115. In 2013, Dr. Compton conducted intelligence screening on Mr. Moore using the WECHSLER ADULT INTELLIGENCE SCALE-FOURTH EDITION (WAIS-IV). Dr. Compton reported an IQ score of **59**, which falls within the mentally retarded range. Mr. Moore obtained the following scale scores on the WAIS-IV:

Verbal Comprehension:	58 (Extremely Low)
Perceptual Reasoning:	73 (Borderline)
Working Memory:	66 (Extremely Low)
Processing Speed:	62 (Extremely Low)
Full Scale I.Q.:	59 (Extremely Low)

116. **Unadulterated Mean**: For the purposes of obtaining an average IQ score, the score from the abbreviated version of the 1989 WAIS-R was not included in the calculation as it measured the exact same sub-sets as the full-scale WAIS-R which was administered the following day. Therefore, the mean IQ score, calculated from Mr. Moore's six IQ scores is **70.66**

117. **Consideration of the Standard Error of Measurement:** This Court can be 95% confident that Mr. Moore's IQ scores fall within the following ranges of each test:

Otis-Lennon Mental Abilities Test:	72 – 82
Slosson Intelligence Test for Children:	52 – 62
WISC:	73 – 83
Bender Visual Motor Gestalt Test:	62 – 72
Goodenough Draw-A-Man:	67 – 77
WAIS-R:	68 – 78
WAIS-IV	56 – 64

118. **Flynn-Adjusted Scores**: It is important to be aware of the date at which the test was published and the date at which the test was administered in order to make the necessary adjustments for the Flynn effect -- as explained in paragraphs 47, 48, & 49 above. As an example of the calculation that the Court conducted: the Slosson test was published in 1964 and administered in 1972; to adjust for the Flynn effect, the proper calculation takes account of an increase in IQ of 0.33 points per year. Therefore: 57 (8 x 0.33) = **54.36**

119. This Court has assumed that each IQ test administered was the most up to date test available at the time; if it were not then the Flynn effect would be significantly more pronounced.

Test	Date Published	Date Administered	Flynn-Adjusted IQ	Flynn-Adjusted SEM
Otis-Lennon Mental Abilities Test	4th Edition published 1967	1971	75.68	70.68 - 80.68
Slosson Intelligence Test for Children	SIT-1 published 1964	1972	54.36	49.36 - 59.36
WISC	The test would have been the original 1949 version as the revised version was not published until 1974.	1973	70.08	65.08 - 75.08
Bender Visual Motor Gestalt Test	Would have used the 1938 edition as the second edition was not released until 2003	1973	55.45	50.45 60.45
Goodenough Draw-A-Man	Revised edition published in 1963	1973	67.7	62.7 72.7
WAIS-R	Published in 1981	1989	71.36	64.36 - 74.36
WAIS-IV	Published in 2008	2013	57	52 - 62

120. The mean Flynn-adjusted IQ score is **64.52** +/- 5.

121. **Dr. Garnett's Assessment of Mr. Moore's Intellectual Functioning**. Dr Garnett reviewed documents reflecting the academic, behavioral and professional records for Mr. Moore, along with reports and records from the Juvenile Probation Department, the Texas Department of Criminal Justice, Court transcripts and medical, psychological and educational resources. He conducted the review in June, 2003, in order to determine whether there was sufficient evidence to support a motion for a hearing to determine whether Mr. Moore might meet the criteria for mental retardation as defined by current psychological theory.

122. Dr. Garnett noted that Mr. Moore's records report a number of IQ scores, which are the same as listed above. He explicitly challenges the validity of the Otis-Lennon Mental Abilities test which was administered to Mr. Moore in 1971. Dr. Garnett references the fact, that records from this time indicate that Bobby's reading ability fell within the 2nd percentile -- and was a full two years below the level expected for a child of Bobby's age. Dr. Garnett, notes that: *"The test* [Otis-Lennon Mental Abilities] *is a group paper-and-pencil test of general mental abilities which requires one to read the test and answer the questions. Due to the ongoing evidence of his inability to read, this score is questionable as to its validity*[88]*."*

---

[88] TAB V

123. Dr. Garnett indicates that the WAIS-R tests, administered to Mr. Moore in 1989 by the Texas Department of Corrections and Justice, further underscored deficits in Mr. Moore's intellectual and mental processes.

124. Dr. Garnett concludes his section on Mr. Moore's intellectual functioning by stating that: *"It is clear that the preponderance of the indicators particularly when combined with Mr. Moore's academic record indicates substantive limitations in learning and progressing during the developmental period. Those indicators also clearly establish a pattern of significant deficits in intellectual functioning."*

125. **Dr. Borda's Assessment of Mr. Moore's Intellectual Functioning**. In 1993, Dr. Borda testified at Bobby Moore's retrial. Before giving evidence to the court, Dr. Borda had the opportunity to look at the following records: Records from the H.I.S.D. (Houston Independent Schools District); records from Hartman Middle School; records from the Texas Department of Corrections.

126. With reference to Mr. Moore's results from the WAIS-R test administered in 1989 by the TDCJ, Dr. Borda states, *"All of his scores are very uniformly within the borderline to retarded range."* He equates Mr. Moore's IQ score to a mental age of around 14 years -- Mr. Moore was 30 years old at the time of the test.

127. When asked whether Mr. Moore's IQ could potentially be within the retarded range. Dr. Borda responds by saying, *"I think there is a good possibility."*

128. Dr. Borda also made reference to the consistency of Mr. Moore's IQ scores, *"His test scores have not really differed significantly from those determined when he was in school before he was incarcerated."*

129. Based on the mental age estimates obtained from tests administered to Mr. Moore in 1973, Dr. Borda estimated that Mr. Moore's IQ in sixth grade could actually have been as low as **66**:

"This estimate is based on the average 'mental age' found in various tests done on Bobby in sixth grade, which equals 105 months. Dr. Borda then divided that number by Bobby's chronological age which gave Dr. Borda a possible IQ of 66 which, not surprisingly, is well within the retarded range."[89]

130. Despite the above statements from Dr. Borda, at the time he did not consider Mr. Moore to fulfill the clinical requirements of a diagnosis as mentally retarded. Instead, he believed that physical abuse, neglect and substance abuse may have affected his mental .status at the time of the incident[90].

131. Dr. Borda has since had the chance to review a significantly more extensive collection of documents concerning Mr. Moore. They are broadly the same documents which Dr. Garnett used to conduct his review. **After reviewing these documents, Dr. Borda expressed his clinical opinion that Mr. Moore's deficits**

---

[89] Memo from Kristi Franklin Hyatt's meeting with Dr. Robert P Borda pg 5863 TAB M

[90] Memorandum April 13, 1993. TAB M

satisfy both the AAIDD and DSM-IV criteria for a diagnosis of mental retardation / intellectual disability.

132. Dr. Borda met with Mr. Moore in December 2013 and administered a function of higher frontal lobe test. It is a front lobe test in which the doctor places 50 tinkertoys on the table in front of the patient or applicant or claimant and the instructions are very simple. The test directs one to "make something." The patient can take as long as they want but the patient has at least ten minutes. This is an unstructured test designed to test motor visual skills, spatial appreciation, three-dimensional understandings and shapes, visual acuity and general intelligence. It also tests one's ability to plan ahead. A score below 7 generally equates with very poor likelihood of gainful employment and poor ability to live independently. Mr. Moore achieved a score of 1, the lowest score Dr. Borda has ever recorded.

133. Practice effects would be minimal for Mr. Moore as it had been many years since he was tested.

134. **Dr. Greenspan's Assessment of Mr. Moore's Intellectual Functioning.**

a. Flynn Effect The Flynn effect absolutely should be applied, not just if a test is ten years old but even if it's a brand-new test. The date a test is published, it's actually two years out of date in terms of the norms because there's about an average of a two-year period between the norming process, which is rather extensive, and then the publication process,

which is also about two years, so that every test is out of date the day it's published and a Flynn Effect should always be applied. When corrected for Flynn Effect, the scores that Mr. Moore received were 70 and 71. So that would be within the range of the DSM-IV and well within the range under DSM-V.

b. Standard Error of Measurement the standard error, as Dr. Borda pointed out, is 5 points standard of error. So that means any score of under 75 would qualify.

c. Consistency of Scores Mr. Moore has never tested anywhere near the average range. Mr. Moore would have had every incentive to test as high as possible as a child.

135. **Dr Williams-Anderson's Assessment of Mr Moore's Intellectual Functioning.**

Past IQ

a. Mr. Moore consistently scored in the deficit range, even when his first formal testing did not occur until he was 13 years old (1973), which is about the same time he left school.

b. If tested when deficits were first apparent (approximately age of 6/1st grade), his IQ would very likely have been below the reported standard score of 70.

c. In 1989 Mr. Moore obtained a full scale IQ of 71. This is consistent with his previous scores, suggesting that time and experience while incarcerated did not bring about new learning for Mr. Moore.

d. Current: Dr. Williams-Anderson tested and evaluated Mr. Moore for a period of 11/22/2013 to 12/19/2013.

B. Mini-Metal Status Exam (MMSE)

C. Rey Complex Figure Test (RCFT)

D. Symbol Digit Modalities Test (SDMT)

E. Trails A&B

F. Hooper Visual Organization Test (HVOT)

G. Controlled Oral Word Association (COWA)

H. California Verbal Learning Test-II (CVLT-II)

I. Delis-Kaplan Executive Functioning System (DKEFS)

J. Wide Range Achievement Test-4th edition (WRAT-4)-Math Subtest

K. Wechsler Adult Intelligence Test-IV WAIS-IV-Math-subtest

e. Test findings from the current evaluation indicated slowed processing speed, difficulty with reasoning and judgment, and deficits in verbal ability that cannot be solely attributable to a limited fund of knowledge.

f. The severity and characterization of the head trauma received by Mr. Moore as a child likely worsened intellectual deficits.

g. On the first of three sessions that took place at the Polunksy Unit on 11/22/2013, which consisted of mostly neuropsychological tests, Dr. Williams-Anderson found is that Mr. Moore's processing speed was slowed, although

he had intact memory, and just from observation and speaking with him for about an hour and a half, she noticed that there were some possible deficits in language and processing speed. On formal tests there were also problems with reasoning and judgment.

h. Dr. Williams-Anderson further explained at the hearing on 1/3/2014, that processing speed is how fast the brain fires. This is the area where she saw the most deficits: "Mr. Moore's processing speed fell in what we call a deficit range, low. Mr. Moore's T score was a 25 that I have listed here, where 50 is the mean and the standard deviation is 10. So. 40 would be low average and then 30 would be low and then he's 25. So he's more than two standard deviations below the mean".

i. Dr. Williams-Anderson found that Mr. Moore had some difficulty with verbal fluency and word-finding. Mr. Moore's language scores if corrected for his lack of education and his grade attainment, his score is then at the 11th percentile and in the law average range.

j. In the executive function tests that Dr. Williams-Anderson administered Mr. Moore's scores fell in the deficient range, and are indicative of deficits that would require formal interventions.

k. In Dr. Williams-Anderson's mathematical tests Mr. Moore demonstrated an ability to perform simple addition. Yet on the WAIS-IV, his scores fell within the 4th percentile and is indicative of moderately impaired ability. On the WRAT-4 Mr. Moore's score is the

equivalent of a third grade level of achievement. That score is classified as falling into the moderate to severe range when compared to the normative sample.

136. **Dr. Compton**

a. Dr. Compton met with Mr. Moore on 1/1/2014, and administered a Wechsler Adult Intelligence Scale, Fourth Edition; it's the most current one, up to date. It was released in 2008. She also gave Mr. Moore him selected subtests of what's called the Wechsler Memory Scales, Fourth Edition.

b. Dr. Compton also administered what is called the Test of Memory Malingering, which is defined as an effort test, and Mr. Moore was administered the Wide Range Achievement Test, Fourth Edition. Then she administered the Texas Functional Living Scales, which is an adaptive functioning measure.

c. Mr. Moore scored a standard score of 59 on the WAIS-IV, which was then Flynn adjusted to 57. This is consistent with Mr. Moore's Slossen score that was achieve at age 13.

F. THE ASSESSMENT OF MR. MOORE'S ADAPTIVE BEHAVIOR

137. According to the AAIDD, limitations in adaptive behavior can be determined by using standardized tests that are normed on the general population, which includes people with and without mental retardation. The AAIDD manual also advocates assessment through other sources of adaptive behavior information such as, *'direct observation, review of school*

records, medical records, and previous psychological evaluations; or interviews with individuals who know the person and have had the opportunity to observe the person in the community but may not be able to provide a comprehensive report regarding the individual's adaptive behavior in order to complete a standardized adaptive behavior scale.' 2010 edition of the AAMR MANUAL. [2010 AAIDD MANUAL at 48]

138. A "significant" limitation is established by a score of two standard deviations below the mean in one of the three adaptive-behavior skill areas described in the 2010 edition of the AAMR MANUAL. [2010 AAIDD MANUAL at 43]

139. The Court also finds as follows:

The first adaptive behavior skill-area is conceptual.

140. Mr. Moore has the following deficits in the conceptual area:

141. **Language.** Mr. Moore, as a child, was quite apparently very different from other children.

a. He didn't know how to communicate with people[91], and when he talked, his severe speech impediment was very obvious[92].

b. Mr. Moore's younger sister, Colleen McNeese, recalls how their father, Ernest, would often beat Bobby because he wouldn't talk: *"He would call Bobby's name and Bobby just stand and look at him. And sometimes he just didn't*

---

[91] Interview with BM TAB C

[92] Interview with Clara Jean Baker TAB L

understand what he was saying to him so he didn't know how to respond."[93]

c. This is corroborated by Mr Moore's cousin, Parvena Williams, who remembers that Mr Moore was *"quiet"* and that *"His dad was always cruel to him for his poor grades and slow speech."*[94]

d. Mr. Moore's childhood friend, Larry Baker, stated, *"Bobby could not follow simple instructions...He had trouble verbally with people."*[95]

e. Indeed, Mr. Moore's only friend at school was an elder boy who was both deaf and dumb.[96]

142. **Reading and writing**. Throughout Mr. Moore's schooling he was kept separate from the rest of the class because he couldn't keep up with the work.

a. Instead of doing reading, he was allowed to draw pictures instead.[97]

b. Mr Moore's cousin, Parvena, states that *"In third grade I did all of Bobby's schoolwork... He really could not read when we were in 3rd grade."*[98]

---

[93] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[94] Parvena Williams Affidavit

[95] Larry Baker Affidavit

[96] Interview with BM TAB C

[97] Interview with BM TAB C

[98] Parvena Williams Affidavit

c. Mr. Moore's younger brother, Lonnie Moore, also remembers that Mr. Moore *"Could not do his own schoolwork"* and *"Bobby could not read the sports page"*[99]

d. Mr. Moore's elder brother, Jonny B Moore, remembers that their father would tell Mr. Moore that he (Mr. Moore) couldn't read and that he was stupid[100].

e. It seems that it was because of Mr. Moore's slowness and his inability to read or write, that his father would pick on him by threatening him and beating him more than any of the other children: *"Bobby was always slow in school and my dad would always pick on him about that. He would constantly yell at Bobby that he was dumb or stupid."*[101]

f. Mr. Moore recalls that he was a slow learner who *"could not read or write when he left school."*[102]

143. Academics in general. As discussed in the above paragraph, teaching staff who came into contact with Mr. Moore noticed that he was much slower than the other children. According to Colleen: *"They're [the teachers] always talking to each other about it, him, in the halls*

---

[99] Lonnie Moore Affidavit

[100] Meeting with Jonny B Moore 05-28-00. pg. 7687 TAB Q

[101] Affidavit of Colleen D. McNese TAB G

[102] Interview with Bobby Moore TAB C

talking, and they were asking if he was retarded."[103]

144. In 1966, he was assessed with the Metropolitan Readiness Test and was found to be functioning at the 9th percentile nationally.[104] Further results that same year confirmed Mr. Moore's below average intellectual functioning. When he was given the Draw-A-Man test, results indicated that he was *"immature"* compared to his peers.

145. Mr. Moore failed first grade twice[105]. During the repeated year, comments on his student records show that he was below average in his ability to respond *"promptly and willingly"* to directions and it is indicated that he was not self-reliant. Further, Mr. Moore had a *"below average ability to discipline himself"* and was below average in how *"attentive"* he is.[106]

146. In 1968, despite having failed first grade twice, Mr. Moore was socially promoted to second grade, in order to keep him with children of a similar age[107]. His grade card indicates that he still lacked self-discipline and had below average attention[108].

147. In 1969 the trend continued and Mr. Moore failed second grade and is socially promoted

---

[103] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[104] ELEMENTARY TEST RECORD pg 000864 TAB J

[105] Houston Public Schools Elementary pg. 000862 TAB J

[106] Elementary School Report Card pg 000789 TAB J

[107] Houston Public Schools Elementary pg. 000862 TAB J

[108] Elementary School Report Card pg 000789 TAB J

again to third grade[109]. Teacher's remarks from that year indicated that Mr. Moore attended a special education program in the summer, was recommended for 'IPP LRP' and was also referred to a counselor[110]. An Iowa Test of Basic Skills puts his battery composite score within the 12th percentile nationally[111].

148. In 1970, Mr. Moore failed 3rd grade and is once again socially promoted to fourth grade[112]. The results of an Iowa Test of Basic Skills, administered in 1971, confirmed that his intellectual functioning is significantly below average: his scores placed him within the 5th percentile nationally[113]. The provided Grade Equivalent is third grade, and when one considers that Bobby was held back a year, one can see that he was performing at a level **two years** below his chronological age.

149. In 1971, Mr. Moore fails 4th grade but is socially promoted to 5th grade[114], after having spent 22 days at a summer-school. That same year, when Mr. Moore was now aged 12, he obtained an IQ score of 77 on the Otis-Lennon Mental Abilities Test[115] [116].

---

[109] Houston Public Schools Elementary pg. 000862 TAB J

[110] Houston Public Schools Elementary pg. 000862 TAB J

[111] IOWA TEST OF BASIC SKILLS pg. 000875 TAB J

[112] Houston Public Schools Elementary pg. 000862 TAB J

[113] Iowa Test of Basic Skills: pg 000850 TAB J

[114] Houston Public. Schools Elementary pg. 000862 TAB J

[115] ELEMENTARY TEST RECORD pg 000864 TAB J

[116] Iowa Test of Basic Skills: pg 000850 TAB J

150. In 1972, notes from the Houston Independent School District (HISD) indicate that Mr. Moore *"needs special placement"*[117]. His Iowa Test of Basic Skills score followed the past trend and placed him in the 9th percentile nationally.[118] That same year the HISD administered the Slosson Intelligence Test for Children on Mr. Moore and he was evaluated to have an IQ of just 57 and a mental age of only 7.5 years -- despite being 13.1 years old.[119]

151. After failing the 5th grade and being socially promoted to 6th grade, the school requested that Mr. Moore's parents agree to have him considered for an evaluation of his educational needs.[120] They agreed, and on the 24th of January 1973 Mr. Moore was given a psychological evaluation by Hollis King Ph.D and Marcelle Tucker[121]. The report states that the reason for referral is: *"Academic level for below grade level; withdrawn; takes no part in class unless called on"* The *'Relevant Background Information'* section confirms his poor academic performance: *"Repeated first grade -- all social promotions since that time."* They evaluated Mr. Moore's intellectual functioning by administering the Wechsler Intelligence Scale for Children (WISC) and he

---

[117] pg 000853 TAB J

[118] TAB J

[119] ELEMENTARY TEST RECORD pg 000864 TAB J

[120] Parent Request pg 000857 TAB J

[121] HISD Center for Human Resources Development pg 000855 & 000856 TAB J

achieved a Full Scale IQ of 78 which equates to a Flynn-adjusted IQ score of **70.08**.

152. The evaluation also aimed to measure his mental age. Mr. Moore's actual age was 13 but a Bender Gestalt test calculated his mental age to be just 8 years and 11 months (107 months total). And a Goodenough Draw-A-Man test calculated his maturity to be just 9 years and 6 months (114 months total).[122]

153. The psychological evaluation continues by recommending that Mr. Moore be placed in the Precision Learning Center for reading and possibly for math: despite being in sixth grade, Bobby is only reading with 84% accuracy on second grade level -- meaning he is five years below his chronological age: and although he knows addition, he does not seem to realize that subtraction is the reverse of addition. Perhaps most tellingly, **the report recommends that teachers conduct daily drills with Mr. Moore -- now aged 13 -- on such basic things as days of the week, months of the year, seasons, standards of measure and telling time.**

154. That same year, Mr. Moore's Iowa Test score composite fell within the 5th percentile nationally: 95% of the test population would have done better than him[123]. Colleen McNeese, Mr. Moore's younger sister, recalls of this time: *"We were on the seventh grade level and they would give him like third grade work to do. And*

---

[122] HISD Pyschological Evaluation TAB J

[123] IOWA TEST OF BASIC SKILLS pg. 000875 TAB J

I would have to stay after so I could help him"[124] Indeed, despite being younger than Mr. Moore, Colleen had helped him in class for at least a year and a half. *"He wouldn't participate in anything. It was because he didn't understand but they [teachers] didn't know that he couldn't read. So he asked me if I can come in my class and sit by me so that I can relate to him.*"[125] Mr Moore was also helped by his cousin, Parvena Williams, who remembers that, *"In third grade I did all of Bobby's schoolwork. The teacher finally separated us because she knew I was helping him. He could not do the work on his own without help.*"[126]

155. In 1974, Mr. Moore failed seventh grade and is socially promoted to eighth grade.[127]

156. In 1975, Mr. Moore failed every subject in eighth grade except for science -- in which he gained a grade of 'C' -- but once again he is socially promoted to ninth grade.[128]

157. In 1976, Mr. Moore failed every single subject in ninth grade[129] and never returned to school[130].

---

[124] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[125] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[126] Parvena Williams Affidavit

[127] Permanent Records Grade 7-9 pg. 000859 TAB J

[128] Permanent Records Grade 7-9 pg. 000859 TAB J

[129] Permanent Records Grade 7-9 pg. 000859 TAB J

[130] Permanent Record Grades 9-12. pg 00872 TAB J

158. Mr. Moore recalls that he was a slow learner who *"could not read or write when he left school."*[131] Indeed, his family point out that Mr. Moore did not fail school because he did not try, or because he lacked motivation; *"Bobby always got low report cards and it upset him because he really tri[illegible]."* He would sit on the front porch with his siblings and try to do his homework but *"Bobby would get so frustrated"*[132].

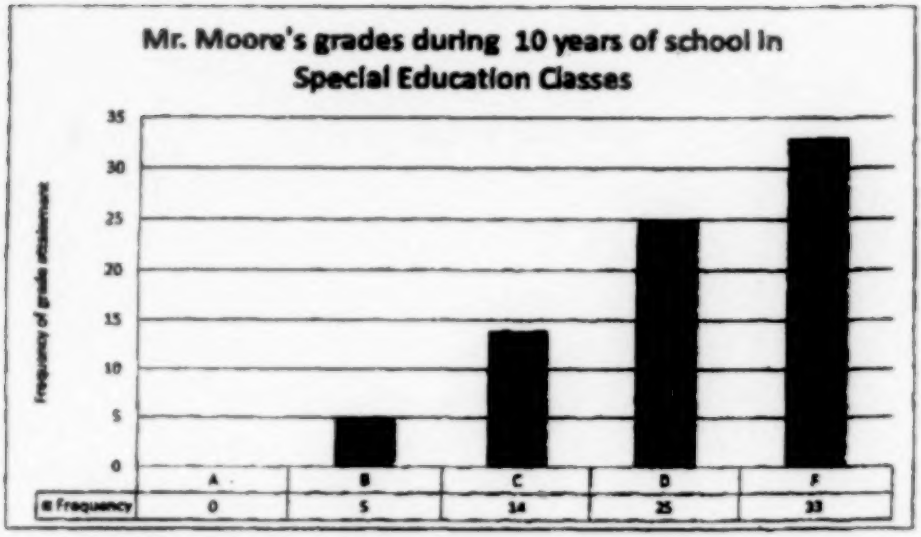
159. This Court has placed substantial weight in Mr. Moore's well-documented academic limitations, and recognizes it as confirming that Mr. Moore's true intellectual limitations are best represented by IQ scores towards the lower end of the confidence interval.

160. This Court has noted the frequency of Mr. Moore's achieved grades, which are presented below:

---

[131] Interview with Bobby Moore TAB C

[132] Interview with Clara Jean Baker pg 7655 TAB L



2. **The second adaptive behavior skill area is social.**

161. **Interpersonal relations.**

a. In 1965, when Mr. Moore was only six years old, after enrolling in Kindergarten at Atherton Elementary School, a school medical examination (at Atherton Elementary School) highlighted Mr. Moore's poor nutritional status and also stated of him: *"[The child is very] withdrawn -- psychological testing recommended. Referred to counselor."*[133] Comments regarding that same medical examination state: *"Child is very withdrawn -- maybe retarded but most likely emotional problems."*[134]

b. On the 24th of January 1973 Bobby was given a psychological evaluation by Hollis King Ph.D and Marcelle Tucker[135]. The report states that the reason for referral is: *"Academic level for*

---

[133] pg 000853 TAB J

[134] pg. 000868 TAB J

[135] HISD Center for Human Resources Development pg 000855 & 000856 TAB J

below grade level; withdrawn; takes no part in class unless called on"

c. Mr. Moore remembers that *"it always seemed like people disliked me"*. And so the teacher singled him out for special treatment and put his desk alongside hers to stop the other children teasing him.[136]

162. **Following rules.** His report card from this period indicates that he is below average in the following categories: *Disciplines Himself, 'Is Courteous' 'Respects Property Rights', 'Is Attentive,' 'Follows Directions', 'Participates Well in Class Activities'*, and *'Does Neat and Orderly Work'*. This equates to below-average marks in seven out of 12 categories, as well as a *'General Conduct Grade'* of *'Unsatisfactory'*[137].

3. **The third adaptive behavior skill area is practical.**

163. In consideration of the fact that Mr. Moore has been incarcerated for nearly all of his adult life, this Court is left somewhat restricted when seeking evidence of his adaptive behavior, especially within the practical realm.

164. **Activities of daily living -- driving.** Mr. Moore never held a driving license, nor learnt to drive.

165. **Occupational skills.** After he left school, Mr. Moore never held a real job; he wanted to get a job working in a hospital so he *"got a man*

---

[136] Interview with BM pg. 7548 TAB C

[137] Elementary School Report Card pg 000789 TAB J

outside to fill out the form but got too scared to go in"[138]

166. **Maintaining safe environments.** The Moore household were all very impoverished and food was often lacking. One may imagine that anyone in such a desperate environment might be driven to extremes, such as eating out of garbage cans. But what makes Mr. Moore's actions different from just anyone's is that despite being treated for ptomaine poisoning, Bobby continued to eat from neighbor's garbage cans and became sick again.[139] A non-retarded individual would have learned that eating the garbage had caused them to be ill and would have attempted to find an alternative food-source.

167. **Living independently.**

a. Lonnie Moore, Bobby's brother, recalls that Bobby was *"always a follower"*[140]

b. Larry Baker, who knew Bobby from his early childhood, remembers that *"Bobby always allowed those around him to make decisions for him,* [he was] *impressionable"*.[141]

c. Larry also recalled that *"He was easily led and very impressionable. He could be distracted or misled easily. We always watched out for him because he was simple. He could not be left on*

---

[138] pg 802 TAB N and TAB C

[139] Affidavit of Colleen D. McNese TAB G

[140] Interview with Lonnie Moore TAB H

[141] Interview with Larry Baker pg 7695 TAB P

his own. People would take advantage if we did not watch out for him."[142]

d. Bobby lacks self-direction and this trait was clearly apparent: *"Bobby wasn't the one to decide things...he just went along with the program"*[143]

e. Interviews with Clara Jean Baker[144] and Marion Moore[145] confirm that Bobby lacked self-direction. He would never come to the family or to friends for assistance with problems. Even when he was kicked out of the house, he slept on the streets despite having friends and family who could have helped him.[146]

f. **There is no evidence that Mr. Moore was able to live independently of his family, even though he earned money through menial jobs.** Even after he was expelled from the family home he immediately sought the protection of someone he described as his 'playmama'.

g. This inability to live independently is also an adaptive deficit.

h. Since being incarcerated, Mr. Moore has been described by guards as a *'model prisoner'*. The very fact that he has adapted to life inside a prison so well, is almost certainly due to its

---

[142] Barry Baker Affidavit

[143] Interview with Clara Jean Baker TAB L

[144] Affidavit of Clara Jean Baker TAB G

[145] Meeting with Marion Moore 05/27/00 pg 7664 TAB I

[146] Meeting BM 05/25/00 pg 7553 TAB C

highly regimented routine, which leaves little room for independent decision-making; all his food and shelter is provided for him and he doesn't have to maintain a job, nor be concerned with activities such as paying bills, that would in all likelihood perplex him.

168. This Court, therefore, finds that these records do not indicate a competency in Mr. Moore's intelligence or mathematical abilities for the purposes of disproving intellectual disability. It is also the view of this Court that these records are not appropriate tools by which to exclude intellectual disability in capital murder cases.

169. This Court finds that, in regards to the commissary records, although the actual goods delivered always met or nearly met the $85 spending limit, a closer examination of the records suggest this is not a valid indication of Mr. Moore's intelligence, or mathematical acumen. Throughout the 24 commissary order slips in evidence, which are the slips Mr. Moore fills out to request goods, there are numerous mathematical and spelling errors. Furthermore, the goods requested often add up to well over that which Mr. Moore is allowed to spend. For example, on the slip dated 12/19/2012 Mr. Moore requested $196.50 worth of goods -- a three-figure total seen in no fewer than 15 of the 24 slips. In fact only twice was Mr. Moore's request under the $85 spend limit (4/1/2013 and 7/5/2013). Mr. Moore has been using this form for at least 14 years, and on the 24 slips in evidence he orders almost the same thing every time. Reflecting on the evidence heard from Mr LeBanc, this Court finds that it is

impossible to discount whether or not Mr. Moore receives or previously received help filling out his forms; or whether he multiples the numbers, or simply spends all night adding the numbers. However, this Court does find that there is evidence to show that Mr. Moore has sufficient time to create the calculations on the order form out of sight of any Commissary Officer, and which on any view, cannot be considered complicated numerical calculations. And yet, despite the basic math involved and simple, unchanging spend limit, the excessive-ordering reflects a lack of understanding of these ordinary concepts.

170. Dr. Garnett's Assessment of Mr. Moore's Adaptive Functioning. Dr. Garnett states that:

a. *"In addition to having these various reported IQ scores supporting a diagnosis of Mental Retardation, Mr. Moore has exhibited significant limitations in adaptive behavior in several areas of his life for as long as records have been retrieved. There are sufficient historical references to his inability to live effectively in society and to manifest a variety of conceptual and practical skills.*

b. *"From both the perspective of the American Association on Mental Retardation and the American Psychiatric Association, Mr. Moore meets or exceeds threshold diagnostic criteria in the area of adaptive behavior deficit... From the standpoint of the American Association on Mental Retardation, 10th Edition 2002 Manual. Mr. Moore has historically manifested deficits in the "Social Adaptive Skill Area" in*

general, and in specific areas of both the Conceptual and Practical Realms.

c. *"The requirements of the AAMR Manual require significant deficits in one of the three major areas of adaptive skills. For Mr. Moore, this has primarily been in the Social Adaptive Behavior Skills Area, which includes problems in areas such as interpersonal, responsibility, naiveté, follows rules, and obeys laws. Specific deficits have also been historically recorded in self-direction, occupational skills, use of community and maintaining a safe environment. It could be argued that he has also manifested deficits in functional academics and health and safety.* ***This pervasive pattern of deficit clearly exceeds criteria.***

d. *"From the standpoint of the Diagnostic and Statistical Manual of the American Psychiatric Association -- Fourth Addition (DSM-IV), Mr. Moore has historically manifested deficits in "adaptive skill areas" such as social and interpersonal skills, use of community resources, self-direction, and work. The requirement for a diagnosis of mental retardation, self-direction, and work.*

e. ***The requirement for a diagnosis of Mental Retardation in the DSM-IV requires significant deficits in only two of eleven adaptive behavior areas. Mr. Moore has exceeded that threshold, concurrent with a variety of IQ scores within the range of diagnosis, over virtually his entire life."***

171. Dr. Garnett concludes his report by stating: ***"As a result of this assessment of the***

material submitted for review, it is my professional opinion that there is sufficient evidence to suggest that Mr. Moore has mental retardation..."

172. Dr. Borda's Assessment of Mr. Moore's Adaptive Functioning Dr. Borda. States:

a. "From the records which I reviewed recently, it appears that Mr. Moore would satisfy all of these definitions of Intellectual Disability, including those of the APA, the AAIDD, and the SSA. He clearly had marked deficits in adaptive functioning."[147]

b. "Examples of this include his being raised in a physically-and emotionally-abusive family environment, yet never seeking any outside intervention. When he would be "kicked out of the house", he would sleep on neighborhood porches or in cars rather than asking a neighbor or relative for assistance, When he finally did move out of his parent's home permanently, he "lived on the streets" for most of his teenage years; he sometimes was permitted to sleep in a back room of a pool hall in exchange for performing simple chores..."[148]

c. "His family was *very* poor and he often went without eating; Mr. Moore likely had severe nutritional deficits when he was a child, as well as numerous head injuries (from his father, from being beaten by others his age, and by jumping from a moving train) and both likely contributed to his intellectual

---

[147] Borda Affidavit p. 3

[148] Borda Affidavit n. 3

deficiencies. By testimony from family members, Mr. Moore would eat from garbage cans when he was famished even though he had contracted food poisoning in the past from this behavior; this shows that he was not able to learn from past experiences."[149]

d. "He also had communication deficits, with speech impediment and difficulty grasping what others said. He was a very poor student, failed the first grade twice. And apparently only received "social promotions" in school after that point. He also was noted in school records to exhibit attentional deficits. After years of academic failure, Mr. Moore's school recommended when he was 13 years of age that his teachers conduct daily drills on such basic things as days of the week, months of the year, seasons, standards of measure, and telling time. This suggests that his intellectual limitations were profound."[150]

e. "He was reported by family members to "always be a follower", and relied on others to make decisions for him. He was described by teachers as being "very withdrawn", so it is obvious that he had very limited social skills as well as deficits in adaptive functioning."[151]

173. Dr. Greenspan's Assessment of Mr. Moore's Adaptive Functioning

---

[149] Borda Affidavit p.3

[150] Borda Affidavit p.3

[151] Borda Affidavit p.3

a. Dr. Greenspan noted evidence of adaptive deficits across a broad spectrum.

174. Dr. Williams-Anderson's Assessment of Mr. Moore's Adaptive Functioning

Dr. Williams-Anderson stated in her report:

a. "The current evaluation, including records review and a family interview, was conducted to assess domains of cognitive functioning. It seems that Bobby exhibited developmental and intellectual delays early in his life that. were significant enough for him [Mr. Moore] to require consistent monitoring and elicit help from his teachers."

b. "These deficits were demonstrated much prior to the age of 18, which would satisfy criteria for formal diagnosis of Intellectual and Developmental Disability (IDD, formerly referred to as Mental Retardation.

c. "Adaptively, he [Mr. Moore] had some abilities as they relate to self-care, motor skills, and daily living."

d. "He [Mr. Moore] had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition."

e. "Thus, there is historic information that accounts for Bobby's intellectual, developmental, and adaptive deficits; and indicates that he [Mr. Moore] met full criteria for a diagnosis of mental retardation as a child."

175. Dr. Compton's Assessment of Mr. Moore's Adaptive Functioning (From her report

a. Mr. Moore's accrued academic skills while incarcerated are a string indicator of his ability to learn and process information, which is not consistent with a diagnosis of mental retardation.

b. His ability to compose prose within the early college level exceeds the usual grade level attainment of those in the upper bounds of mild retardation.

c. Mr. Moore showed evidence of adaptive functioning skills during the commission of the offense and after the offense, which questions the validity of a mental retardation diagnosis.

Findings of Fact regarding Adaptive Behavior Deficit

176. This Court recognizes that the AAIDD manual requires *'performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills.*[152]'

177. This Court is satisfied that sufficient evidence has been provided to demonstrate that Mr. Moore's adaptive behavior in at least one of the skill-sets is approximately two standard deviations below the mean.

G. ONSET DURING THE DEVELOPMENTAL PERIOD.

---

[152] AATDD pg 43

178. There is ample of evidence that Mr. Moore suffered from significant deficits in adaptive functioning -- the outward manifestations of a significant limitation in intellectual functioning -- before the age of 18.

179. An extraordinary number of the risk factors commonly associated with mental retardation were present prior to Mr. Moore's 18th birthday. Moreover, no evidence was presented that established an intervening cause after the age of 18 that could account for Mr. Moore's substandard intellectual functioning. As noted above, the adaptive behavior deficits were certainly apparent in Mr. Moore before the age of 18.

H. DETERMINATION CONCERNING MENTAL RETARDATION

180. Mr. Moore has mental retardation. His mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the AAMR, and the decisions of *Atkins* and *Briseno*.

181. The finding of retardation is further supported by the determination of three highly qualified expert witnesses -- Dr. Garnett, Dr. Borda, Dr. McGrew, and Dr. Williams-Anderson -- that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning.

182. Taking all of this into account, all three of the expert witnesses have credibly opined that Mr.

Moore meets the diagnostic criteria for mental retardation intellectual functioning.

II. CONCLUSION OF LAW

183. This court finds that Mr. Moore, by a preponderance of the evidence, has established that he meets the definition of mental retardation under the current guidelines of the AAIDD, under both the DSM-IV and DSM-V, and under the prevailing legal standards per *Atkins v Virginia*, 536 U.S. 304 (2002). The record is replete with clear indications from his early childhood risk factors, sub-normal intellectual functioning, and adaptive deficits that would qualify Mr. Moore as mentally retarded.

184. Mr. Moore's evidence of improvement in elementary school level reading and writing after three decades in a controlled environment on death row are not sufficient evidence to counter the large historical record and the testimony at the hearing. The fact that he was able to improve and showed diligent effort is indicative of evolution in his character, not in a change in his limitation.

185. This court also notes that there such strong evidence of Mr. Moore's disability that is takes the unusual step of recommending to the Court of Criminal Appeals, that should it disagree with this courts review of the evidence that there is still more than enough to justify a jury being given the question of his retarding of the special issues under a new punishment proceeding. This case was decided post-*Penry* I. but before *Atkins v. Virginia*, thus it falls under

an unusual legal cusp that would merit another proceeding to determine this issue if the Court of Criminal appeals disagrees with this courts findings.

186. It is therefore the recommendation of this court that relief be GRANTED, and that the Court of Criminal Appeals either reform the judgment of death to one of life in prison under *Atkins v. Virginia*, 536 U.S. 304 (2002); in the alternative that the Court of Criminal Appeals remand this matter for new trial on punishment so that a Harris County jury may determine Mr. Moore's mental retardation under the special issues.

Signed this 6 day of Feb 2014

/s/_____

Judge Susan Brown
Judge, 185th Judicial District Courts
Houston, Texas

The clerk shall transmit a copy of this finding to the CCA upon the date of this order.

APPENDIX C

185TH DISTRICT COURT
HARRIS COUNTY, TEXAS

No. 314483-C

EX PARTE BOBBY JAMES MOORE

Respondent's Proposed Findings of Fact,
Conclusions of Law, and Order

January 23, 2014

The Court, having considered the applicant's application for writ of habeas corpus, the respondent's answer, any exhibits attached to said documents, and official court documents and records in cause numbers 314483, 314483-A, 314483-B, and 314483-C, including the hearing on the instant application, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Procedural History

1. Applicant Bobby James Moore was convicted upon indictment of the felony offense of capital murder in cause number 314483 in the 185th District Court of Harris County, Texas. After the jury answered the special issues, the trial court, on July 22, 1980, assessed applicant's punishment at death.

2. Counsel C.C. Devine and Al Bonner represented applicant at trial in cause number 314483.

3. The Court of Criminal Appeals affirmed applicant's conviction on October 9, 1985, and the United States Supreme Court subsequently denied Moore's petition for writ of certiorari. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113, 106 S.Ct. 1167 (1986).

4. On October 27, 1999, the United States Court of Appeals for the Fifth Circuit ordered a new punishment hearing in applicant's case. *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

5. A second jury heard applicant's case and answered the special issues. Pursuant to the second jury's answers, the 185th District Court of Harris County, Texas, on February 14, 2001, assessed applicant's punishment at death.

6. Counsel Robert Morrow, represented applicant at the second punishment hearing in cause number 314483.

7. The Court of Criminal Appeals affirmed applicant's punishment on January 14, 2004, and the United States Supreme Court subsequently denied Moore's petition for writ of certiorari. *Moore v. State*, No. 74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

8. Applicant filed the instant application on June 17, 2003, and a supplemental writ on April 21, 2009.

9. The Court ordered previous counsel to file an affidavit addressing applicant's claims.

10. Counsel Robert Morrow filed an affidavit on April 3, 2008.

11. The Court held an evidentiary hearing on January 2 and January 3, 2014, to receive evidence relevant to applicant's claim under *Atkins v. Virginia*, 36 U.S. 304 (2002), which prohibits the execution of mentally retarded persons, and heard argument on the evidence on January 23, 2014.

General Findings of Fact

12. The Court finds that all exhibits entered into evidence at the evidentiary hearing on applicant's writ are credible, reliable, and truthful.

13. The specific findings of fact that follow are based on the records in cause numbers 314483, 314483-A, 314483-B, and 314483-C, exhibits, and witness testimonies that support them.

14. To the extent that witnesses testified differently concerning matters addressed in the specific findings of fact that follow, the Court finds: (1) the witness testimony supporting the finding of fact to be credible and truthful; and (2) the witness testimony controverting the finding of fact to be incredible and untruthful.

15. The Court has resolved any relevant factual discrepancy not specifically addressed in its findings of fact in the manner supporting its recommendation on relief.

Factual Findings About the Capital Offense

16. Seventy-three year old James McCarble and Edna Scott were working at the Birdsall Market on Friday, April 25, 1980 (CR4 at 1383-84; RR25 at 87-96).[1]

17. On that date, applicant Bobby James Moore and Anthony Everett Pradia and Willie Albert Koonce had been at applicant's house talking about doing a robbery; applicant retrieved a shotgun and pistol from his room and the three left (CR5 at 1644-47; WH RR at State's Exhibit 4).

18. Koonce, Pradia, and applicant rode around in Koonce's car looking for a store to rob (CR5 at 1648; RR25 at 262; WH RR at State's Exhibit 4).

19. Koonce and Pradia entered the store and purchased beer; they then returned to the car and told applicant that there was an old man and an old woman working in the courtesy booth as well as a pregnant woman that sold them the beer (RR25 at 262; WH RR at State's Exhibit 4).

20. Applicant, Pradia, and Koonce drove around for a while and then returned to the store; Koonce entered to ask for change for a $20 bill so he

---

[1] The record consists of multiple clerk's record volumes ("CR# at X" where "#" corresponds to the volume number and "X" corresponds to the page number in the bottom left) that contain the clerks record and reporter's record from the original trial, the clerk's record on applicant's punishment rehearing ("2CR# at X"), the reporter's record from applicant's punishment rehearing ("RR# at X"), the clerk's record from applicant's writ hearing in this case ("WH CR# at X"), and the reporter's records from applicant's writ hearing in this case ("WH RR# at X").

could see if the store had money (RR25 at 262; WH RR at State's Exhibit 4).

21. Koonce returned to the car and told applicant and Pradia that the job would not be a problem (RR25 at 262; WH RR at State's Exhibit 4).

22. Applicant retrieved his shotgun from the car's trunk and then returned to the car, where the three discussed robbing the store and then drove around again (RR25 at 262-63; WH RR at State's Exhibit 4).

23. The three argued over how to split the proceeds of the robbery; specifically, they argued over the fact that Koonce wanted an extra $200.00 from applicant and Pradia for letting them use his car in the robbery (WH RR at State's Exhibit 4).

24. The three agreed that Koonce would rob the courtesy booth, Pradia would rob the cash register, and applicant, armed with his shotgun, would watch the booth and the front of the store (RR25 at 263; WH RR at State's Exhibit 4).

25. Pradia was armed with a pistol (RR25 at 263; WH RR at State's Exhibit 4).

26. Prior to entering the store, applicant disguised himself by putting on sunglasses and a wig (CR4 at 1396, 1400, 1411, 1416; CR5 at 1654, 1661; RR25 at 182, 263; WH RR at State's Exhibit 4).

27 Prior to entering the store, applicant concealed his shotgun by covering it with two shopping bags (CR4 at 1537-38; CR5 at 1654, 1889-90; RR25 at RR25 at 182, 263; WH RR at State's Exhibit 4).

28. Koonce entered the courtesy booth and ordered McCarble to fill a bank bag with the store's money; Scott yelled that they were being robbed and everyone in the store turned to look (RR25 at 182, 223, 263).

29. Applicant pointed his shotgun through the booth's window at McCarble, whose hands were raised in the air (RR25 at 183, 224).

30. Applicant raised up on his toes, sighted down the shotgun's barrel at McCarble's head, and shot McCarble in the center of his forehead (RR25 at 62, 115, 187-89, 209).

31. The shotgun blast blew off the top of McCarble's head, killing him instantly and splattering blood and brain matter in the courtesy booth (RR25 at 62, 115, 187-89, 209).

32. Koonce, Pradia, and applicant fled the store, taking $1,800 of the store's money but leaving behind the shopping bags previously used by applicant to conceal his shotgun (CR4 at 1534-35; RR25 at 105-07, 133-34, 209).

33. Following the robbery, Leonard Goldfield, the store's owner, recovered a yellow bag containing a wig from the store's parking lot and was given a white bag found by a customer inside the front of the store (RR25 at 105-06).

34. One of the bags contained a receipt bearing the name Betty Nolin and address 5906 Southville (CR4 at 1343; RR25 at 203-07).

35. Betty Nolin was applicant's aunt and the person he was staying with at the time of this robbery (CR4 at 1344).

36. A customer noted the description and license plate number of Koonce's car as the three fled the store after the robbery (RR25 at 245).

37. Applicant, Koonce, and Pradia drove to applicant's "play mother's" (Betty Nolin's) house at 5906 Southville after the robbery (RR25 at 264).

38. The next day, police stopped Koonce in his car and found Pradia's wallet in his car (CR4 at 1356, 1359, 1361, 1369-70; RR25 at 246; RR26 at 32).

39. Koonce gave the police a statement, naming Pradia and applicant (RR26 at 26, 32).

40. Pradia subsequently surrendered to the police and also gave a statement naming applicant (RR25 at 246).

41. The police secured an arrest warrant for applicant (RR25 at 247; RR26 at 24).

42. Applicant fled to his grandmother's house in Louisiana following the robbery and was arrested there (RR25 at 247; RR26 at 24).

43. Police found a loaded pistol and money under applicant's bed at his grandmother's house (RR26 at 25).

44. Applicant shaved his head between the time of the crime and the time he was arrested in Louisiana (CR4 at 1502-03).

45. Applicant gave a statement confessing to shooting McCarble, but claiming that the shotgun discharged accidentally (RR25 at 264).

46. In applicant's statement, he confessed to: driving around with Koonce and Pradia in Koonce's car; planning to rob a place in advance;

arguing with Koonce about Koonce wanting an extra $200 from applicant and Pradia, each, for letting them use his car; wearing a wig; concealing his shotgun inside shopping bags; trying to push the complainant back with the shotgun barrel; and discharging the shotgun accidentally when he fell backwards (WH RR at State's Exhibit 4).

47. Prior to his statement, police officers read applicant his *Miranda* warnings; applicant had no trouble understanding them and agreed to waive his rights (CR4 at 1423-36; CR5 at 1684-90; RR25 at 261-68).

48. Police went to the address on the receipt, 5906 Southville, and recovered the shotgun (RR25 at 69, 71, 250-51).

49. The shotgun did not discharge accidentally, evidenced by the fact that it was in good working order and its trigger pull was at least 3.5 pounds (RR26 at 16-17).

50. While inside the residence at 5906 Southville, police observed six mannequin heads; four of the heads had wigs on them (RR25 at 69, 71, 250-51).

51. Two weeks before this capital murder, applicant and two other men robbed Sarah Hitchcock Collins while she was working inside the courtesy booth of the Barnes Minimax grocery store; during that robbery, applicant stood in front of the courtesy booth and pointed a shotgun at Collins and her daughter (who was also present) (RR26 at 54-57).

52. A week before this capital murder, applicant and another man robbed Stella Gattie when she was working as a checker at the Minimax grocery store; during that robbery, applicant pointed a shotgun at Gattie's back while another man pointed a pistol at her and demanded money (RR26 at 58, 60-61).

53. Applicant had previously been convicted of (State's Exhibit 34):

    a. Burglary of a habitation on January 19, 1977;

    b. Burglary of a habitation on February 2, 1977;

    c. Aggravated robbery on December 20, 1976; and

    d. Burglary of a habitation on December 25, 1976

54. Applicant had also committed numerous infractions while incarcerated on death row between his original trial and his punishment rehearing (State's Exhibit 38).

* * *

Applicant's Fourth Through Fourteenth Grounds For Relief

182. In his fourth, eighth, and eleventh grounds for relief, applicant argues that he received ineffective assistance of counsel based on counsel's failure to request that the trial court define the following terms in the special issues submitted to the jury in punishment: "conduct," "continuing threat to society," "society," and "culpability."

183. Applicant argues that trial counsel should have requested definitions of those terms pursuant to TEX. CODE CRIM. P. art. 3.01.

184. In his sixth, ninth, and thirteenth grounds for relief, applicant alleges that the trial court erred in not charging the jury with definitions of those terms after the jury requested them.

185. In his fifth, seventh, tenth, twelfth, and fourteenth grounds for relief, applicant alleges that he received ineffective assistance from his appellate counsel based on appellate counsel not raising on direct appeal the issues he now raises in his fourth, sixth, eighth, ninth, eleventh, and twelfth grounds for habeas relief.

186. Applicant alleges that the lack of such definitions and the alleged ineffective assistance of trial and appellate counsel violated his rights pursuant to U.S. CONST. amends. V, VI, VIII, and IX, and TEX. CONST. art. I, §§ 10 and 19.

187. During punishment deliberations in this case, the jury sent a note stating: "'Conduct' in Special Issue No. 1 implies a 'global' activity inclusive but not limited to the planning, preparation, and execution of the crime (ie: Robbery and shooting). 'Act' as used in the definition of deliberately implies the specific event of discharging the weapon which results in the death of the deceased. What level of activity must the jury assign to the term 'conduct' to which 'deliberately' is applied?" (2CR2 at 496). The court replied in writing, "I can only refer you to the charge of the court" (2CR2 at 496).

188. During punishment deliberations in this case, the jury sent a note stating: "On Special Issue #2 'constitute a continuing threat to society,' if

the alternative to death is life imprisonment, by definition in, our view of society, it is impossible to be a continuing threat. Please define 'continuing threat to society' and 'society' as it relates to our deliberations" (2CR2 at 497). The court replied in writing, "the Court cannot further define 'society'" (2CR2 at 497).

189. During punishment deliberations in this case, the jury sent a note stating: "Please provide the definition of 'culpability'" (2CR2 at 501). The court replied in writing, "the Court can only refer you to the charge" (2CR2 at 501).

190. The jury did not ask for the definition of "conduct."

191. In Defendant's Motion to Set Aside the Indictment (Unconstitutionality of Statute), trial counsel objected to the constitutionality of the Texas death penalty scheme for failure to "define the various terms and phrases used in the three special issues in ways that would permit the jury to give full mitigating significance to those terms (2CR2 at 300).

192. Trial counsel Morrow has submitted an affidavit stating that the law requires no special definitions and he feels that the court would have refused his request to provide them.

193. Morrow also represented applicant on direct appeal.

194. Morrow's affidavit also states that he feels these arguments would have been meritless on direct appeal.

Applicant's Fifteenth and Sixteenth Grounds For Relief

195. In applicant's fifteenth ground for relief he claims that the trial court violated TEX. CODE CRIM. P. art. 36.27 by not communicating with the jury in open court with a court reporter present.

196. Applicant argues that the trial court's alleged error denied his right to effective assistance of counsel, a fair trial, due process, and equal protection of the law pursuant to U.S. CONST. amends. V, VI, VIII, and IX, and TEX. CONST. art. I, §§ 10 and 19.

197. In applicant's sixteenth ground for relief he alleges that he received ineffective assistance of appellate counsel based on appellate counsel not raising such a claim on appeal.

198. During the punishment deliberations of applicant's case, the court replied to the jury's notes with the written answers detailed in the findings of fact to applicant's fourth through fourteenth grounds for relief.

199. The record from applicant's punishment rehearing is silent as to whether counsel and applicant were present in court during these responses or whether counsel objected to the proceedings or the trial court's answers.

200. The jury's notes and the trial court's written replies are part of the clerk's record in this case (2CR2 at 494, 496-97, 499, 501).

201. Appellate counsel Morrow has submitted an affidavit stating that, even if the claim

advanced in applicant's fifteenth ground for relief were error, it would have been harmless.

Applicant's Seventeenth Through Twentieth Grounds For Relief

202. In his seventeenth ground for relief, applicant argues that the trial court erred in failing to properly instruct eh jury concerning its conduct after sequestration in violation of TEX. CODE CRIM. P. art. 35.23 and his constitutional rights under U.S. CONST. amends. V and XIV, and TEX. CONST. art. I, §§ 10 and 19.

203. In his eighteenth ground for relief, applicant contends that his appellate counsel was ineffective for failing to raise such a claim on direct appeal of his punishment rehearing.

204. In his nineteenth ground for relief, applicant contends that he received ineffective assistance of trial counsel when trial counsel failed to object to the trial court's alleged noncompliance with article 35.23.

205. In his twentieth ground for relief, applicant contends that his appellate counsel was ineffective for failing to claim on direct appeal that his trial counsel was ineffective for failing to object to the court's alleged noncompliance with article 35.23.

206. Applicant did not object to the court sequestering his jury after reading the punishment charge or to the sequestration procedures applied.

207. The trial court discussed the prospect of sequestration with the jury the day before jury arguments were given and instructed the jury

to bring supplies and clothing in the event they were needed (RR29 at 66-68).

208. The bailiff indicated to the trial court that "we talked about that," and the trial court subsequently told the jury that "...the bailiff will instruct you" (RR29 at 68).

209. According to the record, trial counsel, prosecutors, and applicant were present during these discussions, and trial counsel did not object to the discussion (RR29 at 65-68).

210. Morrow's affidavit states that he in not aware that error exists and does not see this issue as providing any valid basis for relief in the trial court or in the appellate court.

Applicant's Twenty-First Through Twenty-Third Grounds For Relief

211. In his twenty-first ground for relief, applicant alleges that the evidence is legally insufficient to prove future dangerousness beyond a reasonable doubt.

212. In his twenty-second ground for relief, applicant alleges that the evidence is factually insufficient to prove that he is a continuing threat to society, placing special emphasis on his twenty-one years of good conduct while in prison leading to his punishment rehearing.

213. In his twenty-third ground for relief, applicant alleges that the evidence is factually insufficient to prove that he "deliberately" caused the complainant's death.

214. Applicant raised these claims on direct appeal and they were rejected. *Moore v. State*, No. 74,059, slip op. at 2-6, 2004 WL 231323 (Tex.

Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Twenty-Fourth Ground For Relief

215. In his twenty-fourth ground for relief, applicant claims that TEX. R. EVID. 606(b) is unconstitutional and violates due process and U.S. CONST. amend. VI because it prohibits consideration of the affidavit of jury foreman Fred Baca, which states that the jury considered parole during its deliberations.

216. Applicant raised this issue on direct appeal, but the Court of Criminal Appeals held that applicant inadequately briefed the point of error and, further, waived the claim because he did not timely object on this basis. *Moore v. State*, No. 74,059, slip op. at 9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Twenty-Fifth Ground For Relief

217. In his twenty-fifth ground for relief, applicant contends that the Texas death penalty scheme is unconstitutional as applied because its single aggravating factor of future dangerousness is weighted towards an arbitrary sentence of death when the jury had no discretion in his case to assess a sentence of life without parole.

218. In support, applicant relies upon an affidavit of jury foreman Fred Baca as evidence that his jury was unable to give effect to his good conduct in prison and, had they been able to

give such effect, it "would nullify their finding" that he was a continuing threat to society.

219. Applicant did not object to the constitutionality of the Texas death penalty scheme as applied based on the jury's inability to assess a sentence of life without parole.

220. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

221. Applicant's jury was able to consider his behavior in prison within the scope of the future dangerousness special issue. *See Felder v. State*, 848 S.W.2d 85 (Tex. Crim. App. 1992) (defendant's good deeds while in prison constitutes evidence within scope of future dangerousness special issue); *Hughes v. State*, 897 S.W.2d 285 (Tex. Crim. App. 1994) (defendant's evidence, including evidence of twelve years of good behavior while in prison, could be considered within scope of special issues and did not require additional *Penry*-type instruction).

222. Applicant's jury was also able to consider his good conduct in prison as an aspect of his character, when answering the mitigation special issue asking whether there was evidence, including evidence of applicant's character, that was a sufficient mitigating circumstance to warrant a sentence of life rather than death (2CR2 at 504).

223. This court instructed the jury, "a mitigating circumstance may include, but is not limited to,

any aspect of the defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case" (2CR2 at 489).

Applicant's Twenty-Sixth Ground For Relief

224. In his twenty-sixth ground for relief, applicant claims that the Texas death penalty scheme is unconstitutional as applied because the "continuing threat" special issue is not susceptible to proof beyond a reasonable doubt and the jury could not apply the reasonable doubt rule fairly in the context of such issue.

225. Applicant failed to object at trial on the basis that the Texas death penalty scheme is unconstitutional as applied because the "continuing threat" special issue is not susceptible to proof beyond a reasonable doubt and the jury could not apply the reasonable doubt rule fairly in the context of such issue.

226. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 10, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

227. Prior to trial, applicant objected to the constitutionality of the Texas death penalty scheme based, in part, on a capital jury not being informed of a capital defendant's parole eligibility if the jury assessed a life sentence (2CR2 at 150-348).

228. Applicant's current complaint is in conflict with this argument; applicant now argues that the "mere possibility of parole has the

inevitable effect of reducing the prosecution's burden [on the issue of future dangerousness] to virtually zero." *Applicant's writ at 121.*

Applicant's Twenty-Seventh Ground For Relief

229. In his twenty-seventh ground for relief, applicant alleges that the trial court erred in denying his objection to the statutory definition of mitigating evidence and in denying his requested instruction clarifying the scope of the mitigation as including factors the jurors might believe made the death penalty inappropriate without narrowing the factors relating to his moral culpability.

230. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 10, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

231. Applicant filed a pretrial motion objecting to the constitutionality of the Texas death penalty scheme on the basis that the definition of mitigating evidence "limits the eighth amendment concept of 'mitigation' to factors that render a capital defendant less morally 'blameworthy' for commission of the capital murder" (2CR2 at 313).

232. At the conclusion of the evidence, applicant requested that the jury instruction dealing with the "idea of mere sentiment or sympathy" be deleted (RR29 at 75-76).

233. Applicant argued that the instruction denied him his right, pursuant to U.S. CONST. amend. VIII, to have the jury give effect to

certain mitigating evidence and informed the jury that it could not be "influenced by any sympathetic response to that evidence or any sympathy they may feel for the defendant based on the evidence" (RR29 at 76).

234. The trial court denied the applicant's request to delete the "mere sentiment or sympathy" instruction, and the applicant requested the following "clarification": "Mere sympathy in the instruction means sympathy not tied to or based on any evidence you have heard. You may give effect to any sympathetic response you have to the evidence if you determine that it's mitigating and that it makes a life sentence more appropriate for the defendant than the death penalty. (RR29 at 76-77).

235. The trial court denied the requested charge. (RR29 at 77).

236. Applicant later requested that the trial court include the full statutory explanation of mitigating circumstances so that the jury would be instructed that "a mitigation circumstance may include but is not limited to any aspect of the defendant's character, background, record, emotional instability, intelligence or circumstances of the crime which you believe can make a death sentence inappropriate is this case" (RR30 at 3).

237. Applicant argued that the trial court's "shortened" version violated his constitutional rights, pursuant to U.S. CONST. amend. VIII, and the trial court denied the applicant's request (RR30 at 3).

238. The trial court instructed applicant's jury that it could consider all evidence submitted in answering the special Issues (2CR2 at 487).

239. The trial court also gave the jury the following mitigation instruction: "You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and thereafter, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. You are further Instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues" (2CR2 at 489).

240. The court then submitted the following mitigation special issue to the jury: "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Bobby James Moore, that there is a sufficient mitigating circumstance or

circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" (2CR2 at 504).

Applicant's Twenty-Eighth Ground For Relief

241. In his twenty-eighth ground for relief, applicant alleges that he was denied his right of allocution, namely, that he was not allowed to give a final personal statement of remorse before the jury deliberated and while free from cross-examination.

242. Specifically, applicant refers to the inadmissible affidavit of jury foreman Fred Baca, tendered as a defense exhibit at the applicant's motion for new trial, in which Baca states he would have considered an expression of the applicant's remorse as favorable evidence. *Applicant's writ at 143.*

243. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 10-11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

244. During applicant's trial, the trial court denied applicant's request that he be allowed to give a statement, while remaining free of cross-examination, accepting responsibility for his actions, expressing remorse for the complainant's death, and hoping that the applicant's family found closure (RR29 at 4-5).

245. Subsequently, applicant made a bill of exception for the record, and the trial court

denied applicant's request to publish the statement to the jury (RR29 at 69-70).

Applicant's Twenty-Ninth Ground For Relief

246. In his twenty-ninth ground for relief, applicant argues that the trial court erred in denying his requested jury instruction allowing the jury to consider any residual doubt as a mitigating circumstance when answering the special issue.

247. Specifically, applicant argues that he was deprived of his right to place all mitigating evidence, including the circumstances of the offense, within the jury's effective reach in deciding punishment.

248. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

249. Applicant's requested instruction stated: "You are instructed that you may consider as mitigating circumstance in answering each special issue any doubt you may have about the defendant's guilt, if in fact you have such a doubt. A lingering or residual doubt is not the same as a reasonable doubt. You have been informed that a previous jury found the defendant guilty of capital murder and intentional killing yet you have also heard evidence the jury did not hear, evidence of the defendant's statement that he did not intend to kill the victim and that the gun discharged accidentally. Therefore, there may be some genuine doubt of the defendant's guilt. It may

reflect the mere possibility. It may be the thought of one juror or several. This kind of doubt can be valid consideration in determining whether the State has proved beyond a reasonable doubt that the defendant's conduct that caused the death—the victim's death was committed deliberately under Special Issue Number One and whether the defendant will commit criminal acts of violence that will constitute a continuing threat to society under Special Issue Number Two. Further, such doubt can be a valid reason in the jurors's discretion for not imposing the ultimate and irrevocable penalty of death under Special Issue Number Three." (RR29 at 73).

Applicant's Thirtieth Ground For Relief

250. In applicant's thirtieth ground for relief he claims that the trial court erred in refusing his requested jury instruction on a presumption arising from the loss or destruction of evidence.

251. Specifically, applicant refers to the destruction of his shotgun after his 1980 trial and argues that such destruction harmed him in the jury's consideration of the "deliberateness" special issue.

252. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 7-9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

253. At the conclusion of State's case and before applicant presented evidence, the trial court granted the State's motion to reopen its case to

present the testimony of Jim Haley, Harris County Sheriff's Office (RR27 at 6).

254. Haley, the custodian of records for the Harris County Sheriff's Office, brought to the court the records of the Sheriff's Office pertaining to the investigation of a 1981 burglary in the judge's chambers in the 185th District Court (RR27 at 7).

255. Haley testified that a 12-gauge shotgun, serial number 86740, was admitted into evidence in the applicant's trial in 1980 and that it was stored in the anteroom of the judge's chambers after the trial (RR27 at 8).

256. In April, 1981, someone broke into the judge's anteroom and handled the shotgun, so the Sheriff's Office removed the shotgun from the judge's chambers and processed it for fingerprints (RR27 at 9).

257. When the shotgun was manually logged into the Sheriff's property room, the log noted that the gun was to be returned to the court (RR27 at 13).

258. However, due to clerical error, the shotgun remained in the property room for approximately ten years (RR27 at 9).

259. After the shotgun had been in the property room about nine years, the property room was computerized and the Sheriff's Office believed that the shotgun was erroneously entered as code 99999, an unknown type of offense or found property, instead of code 99900, the code for a homicide (RR27 at 9-10).

260. The Sheriff's Office disposes of found property as a matter of standard procedure if an order is not located (RR27 at 10).

261. However, weapons are not returned to any type of circulation in the public (RR27 at 10).

262. On April 21, 1991, the shotgun was destroyed, i.e., melted down, as part of a general destruction order, signed by a judge, composed of six and half pages of listed guns and property, because the Sheriff's Office is unable to retain all property forever (RR27 at 11).

263. The subsequent investigation did not reveal any evidence that the gun was intentionally destroyed to harm the applicant (RR27 at 13-4).

Applicant's Thirty-First Ground For Relief

264. In his thirty-first ground for relief, applicant contends that the trial court erred in refusing his requested jury instruction that the burden of proof on the "continuing threat" special issue incorporated the same burden of proof concerning extraneous offenses and that the jury had to find beyond a reasonable doubt that the applicant had committed an extraneous offense before considering it when answering any special issue.

265. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 11-12, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

266. Applicant requested the following jury instruction: "You may consider evidence of an extraneous offense or act of misconduct in answering the special issues but only if they have been shown by the State beyond a reasonable doubt to have been committed by the defendant. The State's burden of proving beyond a reasonable doubt the defendant's commission of any extraneous offenses or acts of misconduct arises from and is incorporated into the State's burden of proof [for] a yes answer to Special Issue Number Two beyond a reasonable doubt. (RR29 at 74-5).

267. The trial court denied the requested instruction (RR29 at 75).

Applicant's Thirty-Second Ground For Relief

268. In his thirty-second ground for relief, applicant complains that the trial court imposed an unconstitutional limit on the scope of mitigation in violation of the requirement of individualized sentencing, pursuant to U.S. CONST. amend. VIII.

269. Specifically, the applicant argues that the trial court erred in limiting the testimony of JoAnn Cross.

270. Applicant raised this claim on direct appeal and it was rejected. *Moore v. State*, No. 74,059, slip op. at 13-14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

271. JoAnn Cross, an English solicitor, testified that she came to know applicant though her mother

who began corresponding with applicant in 1990 through an organization called Lifelines (RR29 at 45).

272. When asked what kind of person Cross' mother was, the State objected as to relevancy and hearsay (RR29 at 46).

273. During a bench conference, trial counsel acknowledged that Cross was not an expert witness but was being presented, in lieu of Cross' now-deceased mother, to show the profound effect that Cross' mother had on the imprisoned applicant (RR29 at 46).

274. Outside the presence of the jury, applicant proffered Cross' following testimony: that her mother came from a poor English family. but she achieved, academically motivating her to "reach out" to someone like applicant; that her mother wrote inspirational letters to applicant emphasizing the power of education; that her mother's relationship with applicant was a great joy to her; that applicant's spelling and writing style was not good initially but that her mother noticed his development; that her mother sent applicant books and postcards that they discussed in their correspondence and that allowed applicant to broaden his cultures; that her mother thought that such vicarious travel was beneficial to applicant; that applicant sent gifts he had crafted to Cross and her mother; that her mother was devastated when she learned that applicant's execution was scheduled in 1993; that Cross promised her mother before her mother's death to take care of applicant; and that applicant sent a moving,

sympathetic letter after her mother's death (RR29 at 48-53).

275. At the conclusion of applicant's proffer, the trial court ruled that Cross' testimony pertaining to her mother was inadmissible (RR29 at 54).

276. The State then informed the trial court that it would not object to testimony concerning the effect of applicant's sympathy letter to Cross and the trial court agreed to the admission of such testimony and also testimony regarding the fact that Cross' mother corresponded with applicant (RR29 at 55-57).

277. In the jury's presence, Cross testified that her mother began corresponding to applicant while he was in prison, and applicant wrote Cross a profoundly moving, compassionate letter when her mother died (RR29 at 57-61).

278. In the jury's presence, Cross testified that she began corresponding with the applicant in 1993 and, during the correspondence, applicant's grammar, spelling, use of language, and understanding of cultural and political issues improved (RR29 at 57-61).

279. Cross testified that applicant showed appropriate emotions, such as joy or sympathy, and that he had grown tremendously as a person (RR29 at 60).

280. Cross testified that she took the "assignment" because of her mother and the profound effect that applicant had on her mother, and because she promised her mother that she would stand by applicant (RR29 at 60-1).

281. Cross testified that she greatly respected applicant (RR29 at 61).

282. Cross testified that Applicant sent her jewelry boxes that he made in prison (RR29 at 57-61).

283. As shown above, Cross essentially testified as proffered with the exception of testimony concerning her mother's motivation to help applicant, the contents of her mother's letter, and her mother's feeling toward applicant, their correspondence, and applicant's execution.

284. Applicant presented essentially the same testimony through other witnesses: that applicant grew as a person in prison, gaining compassion and kindness, and that the applicant greatly improved educationally (RR29 at 63, 92-5, 137-8, 140-1, 148).

Applicant's Thirty-Third and Thirty-Fourth Grounds For Relief

285. In his thirty-third ground for relief, applicant contends that the trial court erred in admitting victim-impact evidence, in violation of U.S. CONST. amend. VI and the constitutional prohibition against *ex post facto* laws.

286. In his thirty-fourth ground for relief, applicant argues that the trial court erred in admitting victim-impact/character evidence, creating a constitutionally impermissible risk that the death penalty would be arbitrarily imposed.

287. Specifically, applicant complains of the testimony of the complainant's daughter, Carolyn Plessner.

288. Applicant's thirty-third habeas ground alleging an *ex post facto* violation was raised and

rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 14-15, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

289. Further, on direct appeal the Court of Criminal Appeals refused to consider applicant's fourteenth point of error, repeated as applicant's thirty-fourth ground for relief in the instant habeas proceeding, because the point was not properly before the Court. *Moore v. State*, No. 74,059, slip op. at 19, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

290. During the applicant's new sentencing hearing in 2001, Carolyn Plessner testified that she was close to her father; that it was never the same after her father's death; that he was not there for her children; and that the complainant's death was hard on her mother and affected her emotionally and financially (RR26 at 70-2).

Applicant's Thirty-Fifth Ground For Relief

291. In his thirty-fifth ground for relief, applicant maintains that the trial court erred in denying his requested limiting instruction concerning the proper use of victim-impact/character evidence, in violation of U.S. CONST. amends. VIII and XIV

292. Specifically, applicant complains of the testimony of the complainant's daughter, Carolyn Plessner.

293. On direct appeal of the applicant's case, the Court of Appeals refused to address the applicant's fifteenth point of error, repeated in the instant writ proceeding as the applicant's thirty-fifth ground for relief, because the point of error was not properly before the Court. *Moore v. State*, No. 74,059, slip op. at 19, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

294. After the State and defense rested, the applicant requested the following limiting Instruction regarding victim-impact evidence: "You have heard certain testimony regarding the character of the victim in this case and the effect of his death upon the survivors. You are instructed that you are not to consider this evidence in determining the answers to Special Issue One or Special Issue Two. You have heard certain testimony regarding the character of the victim in this case and the effect of his death upon his survivors. You are instructed that you are not to use this evidence to compare the value of the life of the victim to that of other victims whose death might not result in as great a lost [sic] to their survivors or the community (RR29 at 71-72).

295. The court denied applicant's requested instruction (RR29 at 72).

296. The trial court gave an "anti-sympathy" charge stating: "You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all

the evidence before you and in answering the special issues" (2CR2 at 489).

Applicant's Thirty-Sixth Ground For Relief

297. In his thirty-sixth ground for relief applicant contends that the trial court erred in denying his motion for mistrial based on prosecutorial misconduct after the prosecution allegedly let the jury know that the applicant's co-defendant, Everett Pradia, was given a life sentence and was free and waiting in the courtroom hallway.

298. Applicant's habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 15-16, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

299. During the applicant's trial, Stella Gattie identified the applicant as one of two men who robbed her when she was working at a grocery store on April 19, 1980 (RR26 at 58-61).

300. Gattie also testified that the other robber took the money from the register (RR26 at 61).

301. The prosecutor then asked Gattie if she had seen one of the robbers in the hallway "here today," to which Gattie responded that she had seen one of them when she went to drink water (RR26 at 61).

302. Trial counsel requested that the jury he taken from the courtroom; outside the presence of the jury, counsel requested that the jury be instructed to disregard the cited testimony and he moved for mistrial (RR26 at 62).

303. Trial counsel argued that the State's question was meant to inflame the jury by showing that Pradia was out of jail "on parole or whatever, by escape or however" and to cause the witness to become upset and cry on the stand, "another example of victim impact" (RR26 at 62).

304. The State informed the trial court that it was not responsible for Pradia being there; that it had just learned of his presence from the witness; but, because Pradia was there the State wanted to bring him to the door so that Gattie could identify him as the other robber (RR26 at 62).

305. The trial court questioned both the State and trial counsel and both stated that they were not responsible for Pradia's presence although a member of the defense team had noticed Pradla earlier (RR26 at 63-5).

306. However, the State had earlier issued a subpoena for Pradia to appear on February 5, 1980, but his attorney informed them that he would assert his rights under the Fifth Amendment, so the State could not call him (RR26 at 66).

307. At the conclusion of the discussion, the trial court ordered that Pradia be removed from the floor if he was still present, because neither the State nor trial counsel wished to call him (RR26 at 67-9).

308. When the jury returned to the courtroom, the trial court instructed the jury to disregard the State's last question and the witness's last answer (RR26 at 69).

309. Neither the State nor the applicant elicited further testimony from Gattie (RR26 at 69).

310. The following day, on February 8, 1980, the bailiff of the 185th District Court informed the trial court that he spoke with Pradia the previous day and that Pradia said that he had not appeared in court in response to the subpoena for February 5th, so he thought there might have been a warrant issued based on his non-appearance, and he called a deputy told him to just come to the court (RR27 at 4).

311. Trial counsel informed the court that a member of the defense team saw Pradia and told him that he was not supposed to be in the courtroom and that he could not talk to Pradia because his attorney was not with him (RR27 at 5).

312. Applicant argues that any knowledge that Pradia, one of his co-defendants, was free constituted irrelevant and prejudicial testimony.

313. According to applicant, if the jury had thought that life "meant" life, it would have so voted, but that Pradia's free presence negated such thought.

314. However, the jury was not informed that Pradia had been charged or convicted of capital murder, much less that Pradia had received a specific sentence.

Applicant's Thirty-Seventh Ground For Relief

315. In his thirty-seventh ground for relief applicant contends that the trial court erred in overruling his objection to the State's jury argument that allegedly asked the jury to

return a death sentence for reasons outside the scope of the special issues.

316. Applicant's habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 12-13, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

317. Prior to the State's argument, trial counsel argued that applicant's actions in shooting the complainant were not deliberate; that it was questionable whether the complainant had his hands in the air; and that applicant could have discharged the gun in a panic while failing backward (RR30 at 25-34).

318. Trial counsel further argued that the applicant had changed and grown as a person and that, "[w]hen you have that connection to somebody else, once you feel part of the community, you can't go back" (RR30 at 42-3).

319. During the State's jury argument, the prosecutor argued that applicant's guilt had already been determined; that applicant had prior offenses; that applicant's defense experts did not have a full picture of applicant's record; that evidence showed that the shotgun would not discharge accidentally; that it was a reasonable inference that applicant wanted to kill the complainant so that he could not identify applicant; that applicant's conduct was deliberate; that the facts of the robbery showed that they choose to rob the "weak and defenseless"; that applicant deliberately choose a powerful weapon; that applicant's conduct

was not the fault of others; and that applicant's conduct was what the case was about (RR30 at 45-54).

320. The prosecutor then argued: "And I'll tell you what this case is all about. Well, you know, oh, he was a great guy on death row. If they're talking about executing you from 1986 and 1993, don't you think you would behave? Certainly. He's got that much sense. Anybody would. This case really, ladies and gentlemen, I submit to you, is about saving lives. By your verdict you can tell every would-be killer out there on the street right now this simple message. That if you show mercy to your victims and don't blow them away, a jury might show mercy to you. That's the message that you must send loud and clear out there. You should also tell them if you gun down innocent victims you're going to pay for it, that Harris County isn't going to stand for it, won't tolerate it one more, you are not going to murder people" (RR30 at 54-57).

321. Applicant then objected to the prosecutor "encouraging the jury not to answer the special issues and instead trying to inflame them"; the court instructed the jury to decide the case based on the evidence and the law in the jury charge and denied applicant's objection (RR30 at 54-57).

322. The prosecutor then argued: "I submit this case is about saving lives, protecting innocent victims, people with their hands up. Think about all the people in our society that have to earn their living behind a counter. They are in grocery stores. They're in convenience stores.

They're in the laundries. They're in Luby's, all the people that have to work every day behind the counter, you've got to protect those people from guys like him that don't want to leave any witnesses. Ladies and gentlemen, that was true in 1980, it is true today, and it will go true tomorrow. You must protect innocent victims from people like Bobby Moore. You cannot allow them to gun people down. It is a death warrant for people who are standing there terrified trying to remember their facts, trying to just make it through the day and get shot down scare right in the face with a shotgun. You cannot tolerate that. You cannot allow that. Just think what the criminals will think. Golly, look what Moore did" (RR30 at 54-57).

323. Applicant then objected to the prosecutor being outside the record, encouraging the jury to speculate, and trying to get the jury "not to answer the special issues according to the evidence"; the trial court overruled the objection and instructed the jury to decide the case based on the evidence and the law in the jury charge (RR30 at 54-57).

Applicant's Thirty-Eighth Through Fortieth Grounds For Relief

324. In his thirty-eighth and thirty-ninth grounds for relief, applicant contends that, in light of the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Mosley v. State*, 983 S.W.2d 249 (1998), the mitigation issue is constitutionally infirm based on the absence of a burden of proof and lack of meaningful appellate review.

325. In his fortieth ground for relief, applicant maintains that TEX. CODE CRIM. P. art. 44.251, requiring appellate review of sufficiency of all capital punishment special issues, when interpreted in conjunction with TEX. CODE CRIM. P. art. 37.071, § 2(e), placing no burden of proof in the mitigation special issue, is facially unconstitutional.

326. Applicant's habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No: 74,059, slip op. at 17-18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Forty-First and Forty-Second Grounds For Relief

327. In his forty-first ground for relief, applicant contends that the trial court erred in denying the applicant's motion for new trial on the ground that it would be cruel and unusual punishment in violation of U.S. CONST. amend. VIII to execute the applicant after spending twenty-two years on death row.

328. Applicant's forty-first habeas claim has been raised and rejected on direct appeal of the applicant's case. *Moore v. State*, No. 74,059, slip op. at 18-19, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

329. In his forty-second ground for relief, applicant alleges that trial counsel are ineffective for failing to present a pre-trial *Lackey* claim, 514 U.S. 1045, 115 S.Ct. 1421 (1995), protesting the

constitutionality of a death sentence after a lengthy imprisonment.

330. Counsel Morrow's affidavit states that he considered it before trial, but for some reason did not raise it, and he cannot now think of a strategic reason for not raising it before trial.

331. There is no pending execution date in applicant's case.

332. Applicant has spent his time on death row availing himself of all possible avenues of appellate and post-conviction relief in state and federal court.

333. Only after applicant obtained the relief which he sought, the setting aside of his original death sentence, and only after he again received a sentence of death in the primary case, did applicant complain that he was suffering cruel and unusual punishment based on the complexity and length of the appellate process which he initiated and continued.

334. Also, applicant is again placed at the beginning of the appellate process by the federal court's setting aside of his first death sentence and his subsequent, second death sentence in 2001.

Applicant's Forty-Third and Forty-Forth Grounds For Relief

335. In his forty-third ground for relief, applicant alleges that the State withheld exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

336. Specifically, applicant contends that the State failed to disclose information to the defense concerning Delbert Van Dusen, M.D., who

testified for the State during the 2001 punishment hearing.

337. In his forty-fourth ground for relief, applicant contends that he was denied effective assistance of appellate counsel when counsel failed to raise on direct appeal the Brady issue concerning Dr. Van Dusen.

338. Counsel Morrow's affidavit states that he did not think that this claim had any merit after the hearing on applicant's motion for new trial; thus, he made a strategic decision not to raise it.

339. Dr. Van Dusen testified as the custodian of records for the Harris County Medical Examiner's Office concerning the complainant's autopsy report (RR25 at 55).

340. Robert Bucklin, M.D., actually performed the complainant's autopsy in 1980 (RR25 at 56).

341. Dr. Bucklin's 1980 autopsy report was admitted into evidence during Van Dusen's testimony (RR25 at 56).

342. Dr. Van Dusen testified that the complainant's cause of death was a shotgun wound to the head that caused an explosive rupture to the top of the complainant's head, and that death was instantaneous (RR25 at 57-8, 63-4).

343. Further, the entrance wound was in the area between the complainant's left eye and nose, and the doctor who conducted the 1980 autopsy found shotgun pellets within the remaining cranial tissue during the autopsy (RR25 at 59).

344. When Dr. Van Dusen testified during the 2001 punishment hearing, he simply reiterated the

substance of Dr. Bucklin's 1980 autopsy report, as Dr. Van Dusen's knowledge of the complainant's autopsy was all provided by Dr. Bucklin's report (RR25 at 65).

345. According to Dr. Bucklin's 1980 autopsy report, the complainant's cause of death was a shotgun wound to the head. The report further states that the complainant's head was destroyed from above the bridge of the nose by a "massive" shotgun-type injury; that x-rays showed some shotgun pellets in the cranial cavity; and, that the entrance wound was located at the "medial border of the left eye" (State's Exhibit 46):

346. Following the punishment hearing, applicant filed a motion for new trial, and the trial court conducted a hearing on the motion on March 30, 2001 (RR25 at 535-574).

347. Applicant alleged in the motion for new trial that the State failed to disclose information that applicant could have used to impeach the qualifications and credibility of Dr. Van Dusen. In the motion, applicant conceded that the defense knew that "there had been a problem with Dr. Van Dusen's having a proper license to practice in Texas during some length of time he was performing autopsies," but applicant alleged that the defense did not know that: (1) Van Dusen was terminated from the job he held Immediately before being hired by the Harris County Medical Examiner's Office; (2) pathologists working in the Harris County Medical Examiner's Office considered Van Dusen's work unprofessional and deficient; (3) one Harris County Medical Examiner's Office

pathologist refused to approve Van Dusen's work; and (4) Van Dusen's former supervisor at the Georgia Medical Examiner's Office informed Dr. Joye Carter, Harris County Medical Examiner, of her low opinion of Van Dusen's ability and Van Dusen's being dropped from a forensics pathology. (State's Exhibit 46).

348. In support of the instant claim, applicant included in his motion for new trial the 1999 deposition of Kris Lee Speny, M.D. and the 1999 affidavit of Marilyn Murr Doyle, M.D.

349. In response to the *Brady* allegation concerning Dr. Van Dusen, the State filed controverting affidavits from Dr. Van Dusen and prosecutors Ira Jones and Lynne Parsons (RR25 at 576-591).

350. According to Van Dusen's affidavit, he was not suspended from the practice of medicine when he testified during the applicant's punishment hearing and he did not know of Doyle's affidavit or Perry's [sic] deposition (RR25 at 576-7).

351. Although prosecutors Lynne Parsons and Ira Jones were aware that Dr. Van Dusen was formerly suspended from practicing medicine, they determined that Van Dusen was not suspended when he testified in the instant cause. Further, neither prosecutor was aware of Doyle's affidavit or Sperry's deposition or their contents, other than the fact that Van Dusen was accused of practicing medicine without a license (RR25 at 578-581).

352. Ira Jones notes in his affidavit that Van Dusen was no-billed by a Harris County grand jury on

the issue of practicing medicine without a license (RR25 at 581).

353. Significantly, applicant withdrew the *Brady* allegation concerning Dr. Van Dusen during the hearing on his motion for new trial and asserted that he was waiving the allegation for purposes of the direct appeal (RR32 at 5, 38-9).

Applicant's Forty-Fifth and Forty-Sixth Grounds For Relief

354. In applicant's forty-fifth ground for relief, he maintains that he was denied the effective assistance of trial counsel based on the cumulative effect of trial counsels' alleged errors.

355. In his forty-sixth ground for relief, applicant contends that he was denied the effective assistance of appellate counsel based on the cumulative effect of appellate counsel's alleged errors.

Applicant's Forty-Seventh Ground For Relief

356. In his forty-seventh ground for relief, applicant contends that the cumulative effect of all alleged errors at trial and on direct appeal violated his rights under U.S. CONST. amends. V, VI, VIII, and XIV, and TEX. CONST. art. I, §§ 10 and 19.

Applicant's Forty-Eighth Ground For Relief

357. In his forty-eighth ground for relief, applicant contends that the Texas clemency procedure violates due process and attempts to preserve the issue for review should his instant writ fall on the merits.

358. **Applicant failed to object to the Texas clemency procedures at trial.**

CONCLUSIONS OF LAW

* * *

Applicant's Fourth Through Fourteenth Grounds for Relief

8. Applicant is procedurally barred from raising his sixth, ninth, and thirteenth grounds for habeas relief because his general objection to the lack of definitions, (2CR2 at 300), was insufficient to preserve the claim for review. TEX. CODE CRIM. P. arts. 36.14 and 36.15; *see also Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989) (upholding procedural bar to habeas relief in absence of showing of good cause for not objecting to charge or requesting special instructions concerning mitigating evidence at time of trial).

9. All of the cited terms are construed in their ordinary meanings and, therefore, do not require specific definitions. TEX. CODE CRIM. P. art. 3.01.

10. "Criminal acts of violence," "continuing threat to society," and "society" require no special definitions. *Comacho v. State*, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993) ("society" should be understood in its ordinary connotation); *Coble v. State*, 871 S.W.2d 192 (Tex. Crim. App. 1993) (court not required to define "criminal acts of violence," "continuing threat to society," and "probability" even with respect to consideration of mitigating evidence); *Goss v. State*, 826 S.W.2d 162 (Tex. Crim. App. 1992), *overruled on other grounds, Barnes v. State*, 826 S.W.2d 316 (Tex. Crim. App. 1994) (court's. refusal to define "criminal acts of violence," "continuing threat to

society," and "probability" poses no constitutional problems); *Earhart v. State*, 823 S.W.2d 607 (Tex. Crim. App. 1991) ("deliberately," "probability," "criminal acts of violence," and "continuing threat to society" require no special definitions).

11. "Culpability" is a sufficiently common word that a special definition is not required. *See and cf. Martinez v. State*, 924 S.W.2d 693, 698 (Tex. Crim. App. 1996) (*citing Garcia v. State*, 887 S.W.2d 846, 857 (Tex. Crim. App.1994)) (no error in failing to define "militate," a term that can be given its ordinary meaning).

12. Trial counsel is not ineffective for failing to make a meritless request for supplemental instructions defining such terms or for not lodging objections to the trial court's proper refusal to define them. *See Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (counsel not ineffective for failing to request unsupported charge).

13. Applicant fails to show deficient performance of trial counsel, much less harm. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) (holding standard for determining ineffective assistance of counsel is whether results of proceeding would have been different but for counsel's unstrategic errors).

14. Appellate counsel is not ineffective for failing to present such meritless claims on direct appeal of applicant's case; appellate counsel does not have a constitutional duty to raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983).

15. Courts will not second-guess an appellate attorney's professional judgment to brief only strong points of error. *Id.*

16. Applicant fails to prove by a preponderance of the evidence that, but for appellate counsel's alleged errors, the results of his proceeding would have been different. *See Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (*Strickland* applies to appellate counsel as well as trial counsel).

17. Applicant fails to prove ineffective assistance of trial counsel in his fourth, eighth, and eleventh grounds for relief.

18. Applicant fails to show that the trial court erred in not defining the cited terms in his sixth, ninth, and thirteenth grounds for relief

19. Applicant fails to show ineffective assistance of appellate counsel in his fifth, seventh, tenth, twelfth, and fourteenth grounds for relief

20. Applicant's fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth grounds for relief should be denied.

Applicant's Fifteenth and Sixteenth Grounds for Relief

21. Applicant is procedurally barred from raising his fifteenth ground for relief because the record does not reflect any objection to the manner in which the trial court responded to the notes or to the contents of the trial court's responses to the jury. *See Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

22. Moreover, because the record is silent as to whether counsel and applicant were present in court during these responses or whether

counsel objected to the proceedings or the trial court's answers, applicant fails to show that the trial court did not comply with article 36.27. *See Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995).

23. Moreover, the trial court's responses were basically "non-responses" giving the jury no additional instruction; thus, non-compliance, if any, with article 36.27 does not constitute reversible error. *See Moreno v. State*, 587 S.W.2d 405, 412 (Tex. Crim. App. 1979) (communication between court and jury which does not amount to any additional instruction cannot constitute reversible error notwithstanding noncompliance with article 36.27).

24. Applicant fails to show that the trial court violated article 36.27, and further fails to show that any alleged violation would warrant habeas relief.

25. Applicant's fifteenth ground for relief should be denied.

26. Accordingly, appellate counsel is not ineffective for failing to raise on appeal the meritless claim that trial court violated article 36.27. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983) (appellate counsel does not have a constitutional duty to raise every non-frivolous issue).

27. Applicant fails to show ineffective assistance of appellate counsel in his sixteenth ground for relief

28. Thus, applicant's sixteenth ground for relief should be denied.

Applicant's Seventeenth Through Twentieth Grounds for Relief

29. Applicant is procedurally barred from raising his seventeenth ground for relief because the record does not reflect any objection to the court sequestering his jury after reading the punishment charge or to the sequestration procedures applied. *See Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

30. In 1989 the Legislature amended TEX. CODE CRIM. P. art. 35.23 to allow separation of the jury in a felony case after the charge has been given, provided that the court shall require sequestration if either party requests it. Act of 1965, 59th Leg., ch. 722, p. 317, 1966 (amended 1989) (current version at TEX. CODE CRIM. P. art. 35.23).

31. Article 35.23 does not require the court to instruct the jury concerning its conduct during or after sequestration; it merely requires the court to instruct a jury that is permitted to separate concerning their conduct as jurors when so separated. TEX. CODE CRIM. P. art. 35.23.

32. Based on the foregoing, along with the trial court's comments to the jurors, applicant fails to show that the trial court erred in failing to properly instruct the jury concerning its conduct after sequestration.

33. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

34. Applicant has failed to show that trial counsel was ineffective for not objecting to the trial court's procedures pursuant to TEX. CODE CRIM. P. art. 35.23. *Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981), *overruled on other grounds by Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988) (fact that another attorney might have pursued different strategy will not support a finding of ineffective assistance of counsel).

35. Applicant has failed to show that appellate counsel was ineffective for failing to present on direct appeal a meritless claim concerning an alleged violation of article 35.23 and failing to allege ineffective assistance of trial counsel in that regard. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983) (courts cannot second-guess appellate attorney's professional judgment to brief only stronger points of error on direct appeal); *see also Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (applying *Strickland* to appellate counsel as well as trial counsel).

36. Applicant fails to demonstrate that his constitutional rights were violated under U.S. CONST. amends. V and XIV, and TEX. CONST. art. I, §§ 10 and 19.

37. Applicant's seventeenth through twentieth grounds for relief should be denied.

Applicant's Twenty-First Through Twenty-Third Grounds for Relief

38. Challenges to the sufficiency of the evidence are not cognizable on habeas review. *Ex parte*

Christian, 760 S.W.2d 659 (Tex. Crim. App. 1988).

39. Claims that have already been raised and rejected on direct appeal need not be considered in habeas or other subsequent proceedings and should be denied. ***Ex parte Acosta***, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

40. Applicant's twenty-first through twenty-third grounds for relief are meritless and should be denied.

Applicant's Twenty-Fourth Ground for Relief

41. Because applicant failed to adequately lodge a timely objection on this ground, and because he raised the issue on direct appeal, applicant's twenty-fourth ground need not be considered in this habeas proceeding. ***Ex parte Acosta***, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

42. Applicant is procedurally barred from challenging the constitutionality of Rule 606(b) in this proceeding because he failed to timely object on that basis. *See Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995). (complaint of a statute's constitutionality must be made at trial to preserve the issue for review).

43. Applicant's claim has been rejected by the Court of Criminal Appeals and should be denied. *See* ***M Quarrie v. State***, 380 S.W.3d 145 (Tex. Crim. App. 2012) (upholding the Rule but focusing on outside influence); ***White v. State***, 225 S.W.3d 571 (Tex. Crim. App. 2007); *see also Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739

(1987) (upholding federal equivalent to Rule 606(b)).

44. Thus, applicant's twenty-fourth ground for relief should be denied.

Applicant's Twenty-Fifth Ground for Relief

45. Applicant is procedurally barred from challenging the constitutionality of Texas's death penalty scheme as applied based on the jury's inability to assess a sentence of life without parole because he failed to timely object on that basis. *See Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (complaint of a statute's constitutionality must be made at trial to preserve the issue for review).

46. Because he raised the issue on direct appeal, applicant's twenty-fifth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

47. Moreover, Texas's previous death penalty scheme, which was in effect at the time of applicant's punishment rehearing, has been held constitutional despite its failure to give the jury an option of assessing life without parole. *Arnold v. State*, 873 S.W.2d 27, 39-40 (Tex. Crim. App. 1993).

48. Moreover, the jury was able to give effect to applicant's good conduct while in prison when answering the future dangerousness and mitigation special issues.

49. Applicant fails to show that the Texas death penalty scheme in effect at his trial was unconstitutional as applied on the basis that his

jury was unable to assess a sentence of life without parole. *Cockrell v. State*, 933 S.W.2d 73, 93 (Tex. Crim. App. 1998) (holding that a defendant has to demonstrate Texas death penalty scheme was unconstitutionally applied to him in order to obtain relief from a death sentence).

Applicant's Twenty-Sixth Ground for Relief

50. Applicant is procedurally barred from challenging the constitutionality of Texas's death penalty scheme as applied based on the "continuing threat" special issue not being susceptible to proof beyond a reasonable doubt and the jury's alleged inability to apply the reasonable doubt rule fairly in the context of such issue. *See Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (complaint of a statute's constitutionality must be made at trial to preserve the issue for review).

51. Because he raised the issue on direct appeal, applicant's twenty-sixth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

52. The trial court properly instructed the jury on the burden of proof beyond a reasonable doubt concerning the first and second special issues (CR2 at 486, 491). *See* TEX. CODE CRIM. P. art. 37.071, § 3(b)(2) and (c) (Vernon Supp. 2001); *see also Moore v. State*, No. 74,059, slip op. at 10, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Resendiz v. State*, 112 S.W.3d 541, 546

(Tex. Crim. App. 2003) (rejecting defendant's claim that future dangerousness special issue is not susceptible to proof beyond a reasonable doubt); *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998).

53. Applicant fails to rebut the presumption that his jury properly followed the court's instructions.

54. Applicant's twenty-sixth ground for relief should be denied.

Applicant's Twenty-Seventh Ground for Relief

55. Because he raised the issue on direct appeal, applicant's twenty-seventh ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

56. Nonetheless, in *Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1997), the Court of Criminal Appeals rejected an argument that article 37.071 is rendered unconstitutional by the definition of "mitigating evidence" found in § 2(f)(4), which allegedly "limits the concept of 'mitigation' to factors that render a capital defendant less morally 'blameworthy' for the commission of the capital murder, holding: "[a]rticle 37.071 § 2(f)(4) "defines" "mitigating evidence" to be "evidence that a juror *might* regard as reducing the defendant's moral blameworthiness." There is no evidence that must be viewed by a juror as being *per se* mitigating. Instead, jurors must individually determine what evidence, if any, mitigates against the imposition of the death penalty and what weight, if any, to give that evidence in its consideration. Article 37.071 § 2 (e) yields

further support to this interpretation in that it requires the court to instruct the jury to take into consideration "*all of* the evidence, *including* the circumstances of the offense, the defendant's character and background, *and* the personal moral culpability of the defendant" in determining whether sufficient mitigating circumstances exist to warrant a life sentence. Because the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror, we conclude that Article 37.071 § 2(f)(4) does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness as appellant alleges." Cantu, 939 S.W.2d at 648-49 (internal citations omitted; emphasis added).

57. Thus, "article 37.071, section 2(e) solves any potential narrowing problem in section 2(f)(4)." *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999) (citing Cantu, 939 S.W2d at 648).

58. Although art. 37.071, § 2(f)(4) statutorily defines mitigating evidence as that evidence that a juror might regard as reducing a defendant's moral blameworthiness, art. 37.071, § 2(e) gives the jury "a vehicle to respond to a broader range of mitigating evidence." *Prystash*, 3 S.W. 3d at 534 (*citing Cantu*, 939 S.W.2d at 648-9).

59. However, evidence relying on mere sympathy or sentiment is irrelevant in considering a defendant's deathworthiness. *Prystash*, 3 S.W.3d at 534.

60. Not instructing a jury to weigh mitigating evidence to determine if it reduces a defendant's

personal culpability is tantamount to leaving the jury directionless after it determines that certain evidence is mitigating. Thus, in the instant case, the trial court, pursuant to art. 37.071, properly and adequately instructed the jury that "[a] mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case" (2CR2 at 489).

61. Moreover, the jury could have considered evidence of applicant's good prison behavior within the scope of the future dangerousness special issue. *See Felder v. State*, 848 S.W.2d 85 (Tex. Crim. App. 1992) (holding defendant's good deeds while in prison constitutes evidence within scope of second special Issue); *Hughes v. State*, 897 S.W. 2d 285 (Tex. Crim. App. 1994) (holding defendant's evidence, Including evidence of twelve years of good behavior in prison, could be considered within scope of special issues and did not require additional *Penry*-type instruction).

62. Applicant's twenty-seventh ground for relief should be denied.

Applicant's Twenty-Eighth Ground for Relief

63. Because he raised the issue on direct appeal, applicant's twenty-eighth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

64. Pursuant to TEX. CODE CRIM. P. art. 42.07, before pronouncement of sentence a defendant

shall be asked if he has anything to say as to why the sentence should not be pronounced. The only reasons that the defendant can show for why sentence cannot be pronounced against him are (1) the defendant has received a pardon for the offense; (2) the defendant is incompetent to stand trial; and (3) the defendant is not the same person who was convicted of the offense and then escaped before pronouncement of sentence.

65. Applicant's request for "allocution" is actually a request to testify and present mitigating evidence to the jury, prior to the jury's verdict, without subjecting himself to cross-examination. *See and cf. Huffman v. State*, 746 S.W.2d 212, 219-220 (Tex. Crim. App. 1988) (holdlng that defendant who takes stand as witness is subject to cross-examination and impeachment as any other witness).

66. Further, as the Court of Criminal Appeals held on direct appeal in this case, applicant "does not possess a constitutional right to make an unsworn statement of remorse before the jury that is not subject to cross-examination." *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*quoting United States v. Hall*, 152 F.3d 381, 396 (5th Cir. 1998), *abrogated on other grounds, United States v. Martinez*, 120 S. Ct. 774 (2000).

67. By asking applicant if he had anything to say before the trial court sentenced him according to the jury verdict (RR31 at 12), the trial court complied with the statutory requirements of

art. 42.07, and the trial court properly refused the applicant to present punishment evidence not subject to cross-examination. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

Applicant's Twenty-Ninth Ground for Relief

68. Because he raised the issue on direct appeal, applicant's twenty-ninth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

69. Applicant's requested instruction is a misstatement of the law urging the jury to consider particular evidence as mitigating and essentially instructing the jury that any doubt concerning the applicant's guilt is mitigating. *See and cf. McFarland v. State*, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996), *abrogated on other grounds, Mosley v. State*, 983 S.W.2d 247 (Tex. Crim. App. 1998) (weighing of mitigating evidence is a subjective determination undertaken by each juror and Court will not review mitigating evidence for sufficiency).

70. Applicant's requested instruction is essentially an attempt to allow the jury to revisit the issue of the applicant's guilt, an issue previously settled by the jury's still constitutional and valid 1980 guilty verdict, during applicant's retrial on punishment only.

71. Although the Fifth Circuit recognizes residual doubt as an appropriate consideration for a mitigating factor, the applicant is not

constitutionally entitled to a jury Instruction to that effect because "The United States Supreme Court has held that there is no constitutional right to have jurors' residual doubts about the defendant's guilt be considered as a mitigating factor during deliberations in a capital murder case." *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Franklin v. Lynaugh*, 487 U.S. 164, 174-7, 108 S. Ct. 2320, 2327 (1988), *vacated and remanded on other grounds*, 503 U.S. 930 (1992) (rejecting Texas capital defendant's claim that he was entitled to residual doubt instruction under former special issues).

72. Thus, the trial court properly refused the applicant's requested instruction on residual doubt.

73. Applicant's twenty-ninth ground for relief should be denied.

Applicant's Thirtieth Ground for Relief

74. Because he raised the issue on direct appeal, applicant's thirtieth ground need not be considered in this habeas proceeding and should be denied. Ex parte Acosta, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

75. In order to show reversible harm based on evidence lost or destroyed by the State, a defendant must show either: (1) the evidence was known to be exculpatory at the time it was either lost or destroyed, and he cannot obtain comparable evidence by other reasonably available means; or (2) that, if the evidence had

only an unknown potential for exculpating him at the time it was either lost or destroyed, the State lost or destroyed the evidence in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 337 (1988); *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 2534 (1984).

76. As the Court of Criminal Appeals held on direct appeal of the applicant's case, the record does not show that the shotgun had exculpatory value before it was destroyed and there is no showing of bad faith on the part of the police concerning the shotgun's destruction. *Moore v. State*, No. 74,059, slip op. at 8, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

77. Further, trial counsel admitted at trial that counsel did not "see any bad faith on the part of the State"; that counsel did not think "there's any bad faith on the part of these prosecutors regarding the gun"; and that counsel did not think "we have evidence of bad faith." *Moore v. State*, No. 74,059, slip op. at 8-9, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

78. Applicant falls to meet the tests set forth in *Trombetta* and *Youngblood*.

79. Applicant's thirtieth ground for relief should be denied.

Applicant's Thirty-First Ground for Relief

80. Because he raised the issue on direct appeal, applicant's thirty-first ground need not be

considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

81. As the Court of Criminal Appeals noted while rejecting applicant's claim on direct appeal, capital cases do not require a separate instruction on the burden of proof on extraneous offenses, as long as the jury has been properly instructed concerning the burden of proof on the special issues. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (citing Ladd v. State, 3 S.W.3d 547 (Tex. Crim. App. 1999); *see* also TEX. CODE CRIM. P. arts. 37.07 and 37.071.

82. As the trial court properly and thoroughly instructed applicant's jury as to the burden of proof on the first and second special issue; a separate instruction as to the burden of proof on extraneous offenses was not required (2CR2 at 486-7).

83. Thus, the trial court did not err in refusing applicant's requested instruction. *Moore v. State*, No. 74,059, slip op. at 11, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

84. Applicant's thirty-first ground for relief should be overruled.

Applicant's Thirty-Second Ground for Relief

85. Because he raised the issue on direct appeal, applicant's thirty-second ground need not be

considered in this habeas proceeding and should be denied. *Ex part Acosta*; 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

86. Nonetheless, applicant cannot establish entitlement to relief because he received the requested relief in light of the fact that Cross was allowed to testify to nearly everything he complains about. *See DeRusse v. State*, 579 S.W.2d 224 (Tex. Crim. App. 1979) (having received the relief requested, error, if any, is cured).

87. Moreover, the trial court properly excluded the hearsay testimony regarding the contents of Cross' mother's correspondence and her mother's motivations and feeling regarding the applicant. *See* TEX. R. EVID. 801(d) and 802.

88. As the Court of Criminal Appeals noted when rejecting applicant's claim on direct appeal, applicant did not urge that any of the proffered hearsay fell within the exception to the hearsay rule upon the trial court's ruling of inadmissible hearsay. *Moore v. State*, No. 74,059, slip op. at 13-14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Jones v. State*, 843 S.W.2d 487, 492-93 (Tex. Crim. App. 1992) (court not obligated to sort through challenged evidence to sort admissible from inadmissible); *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995) (party offering evidence must separate any admissible from inadmissible evidence to preserve for review).

89. Thus, "the trial court was within its discretion to disallow all of the evidence contained in the bill." *Moore v. State*, No. 74,059, slip op. at 14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004); *see also Montgomery v. State*, 801 S.W.2d 372, 370 (Tex. Crim. App. 1990).

90. Moreover, error, if any, in admitting any portion of Cross' testimony was cured by applicant presenting essentially the same testimony through other witnesses: that applicant grew as a person in prison, gaining compassion and kindness, and that the applicant greatly improved educationally (RR27 at 63, 92-5, 137-8, 140-1, 148). *See DeRusse v. State*, 579 S.W.2d 224 (Tex. Crim. App. 1979); *cf. Butler v. State*, 769 S.W.2d 234, 241 (Tex. Crim. App. 1989) (error in admission of evidence cured where same evidence admitted elsewhere without objection).

91. Applicant's thirty-second ground for relief should be denied.

Applicant's Thirty-Third and Thirty-Fourth Grounds for Relief

92. Because he raised the issue on direct appeal, applicant's thirty-third ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

93. A constitutionally prohibited ex post facto law is: (1) a law that makes a previously innocent action criminal and punishes such action; (2) a law that changes the punishment and inflicts a

greater punishment than the law attached to the criminal offense when committed; (3) a law that deprives an accused any defense available at the time the offense was committed; and (4) a law that alters the rules of evidence and receives less or different evidence than the law required at the time of the offense to convict the offender. *See Carmell v. Texas*, 527 U.S. 513, 522, 120 S. Ct. 1620, 1627 (2000).

94. Applicant reasons that Carolyn Plessner's testimony was admitted as a result of the change in TEX. CODE CRIM. P. art. 37.071 concerning the admission of punishment evidence in capital cases and that such change fits the fourth prohibition against *ex post facto* laws: a law that alters the rules of evidence and receives less or different testimony than the law required at the time of the offense to convict the offender.

95. However, on direct appeal of applicant's case, the Court of Criminal Appeals disagreed with applicant's contention that the fourth category concerning ex post facto laws applied to his case. *Moore v. State*, No. 74,059, slip op. at 14, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

96. "Victim impact testimony is not and has never been required in a capital murder trial." *Id.*

97. The Court of Criminal Appeals also refused to address applicant's appellate claim that he would be required to waive the mitigation issue in order to prevent victim impact testimony, thereby allegedly depriving him of effective assistance of counsel. *Id.* at 14-15.

98. Applicant misconstrues the principle of ex post facto law and the judicial basis for the admissibility of Plessner's 2001 testimony.

99. Applicant ignores the fact that Plessner's testimony was admitted for punishment, not conviction; the applicant's 1980 conviction for the offense of capital murder remains valid regardless of the applicant's receiving a new punishment hearing.

100. At the time of the applicant's 1980 trial, art. 37.071 stated, in part: "Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. *In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas*. TEX. CODE CRIM. P. art. 37.071(a) (Vernon's 1979) (emphasis added).

101. However, as the United States Supreme Court later held in 1987, the admission of victim-impact evidence violated a defendant's constitutional rights. *See Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529 (1987).

102. At the time of applicant's 2001 punishment hearing, art. 37.0711, the statute for capital cases committed before September 1, 1991, tracked, in part, the same language of the 1979

statute, i.e., that the trial court can admit any matter that the court deems relevant to sentencing and that the "subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution or the United States or of this State." TEX. CODE CRIM. P. art. 37.0711, § 3(a)(1).

103. However, in 1991, the Supreme Court held that the eighth amendment is not a per se bar to the admission of evidence of the victim's personal characteristics or the impact of victim's death upon his family and loved ones. *Payne v. Tennessee*, 501 U.S. 808, 825 S. Ct. 2597 (1991), *overruling in part, Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529 (1987).

104. Thus, any constitutional bar to Plessner's testimony in 1980 was removed as a result of the Supreme Court's judicial decision in *Payne*, not because of a change in art. 37.071. *See and cf. Ex parte Bonham*, 707 S.W.2d 107, 108 (Tex. Crim. App. 1986) (holding that judicial decision having unjust retroactive application is barred by due process of United States Constitution rather than by art. I, § 10 ex post facto provision).

105. Further, art. 37.071 is procedural in nature; the statute controls the process by which a capital sentencing hearing is adjudicated as opposed to amending the substantive law by defining criminal action or providing for penalties. *See Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex. Crim. App. 1985); *Ex parte Scales*, 853 S.W.2d 586, 588 (Tex. Crim. App. 1993).

106. A procedural statute controls pending cases from the statute's effective date, absent a provision to the contrary. *Johnson*, 697 S.W.2d at 607-08.

107. In 1998, the Court of Criminal Appeals clarified its prior holdings concerning the admission of victim impact/character evidence in *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), holding that "both victim impact and victim character are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence." *Id.* at 262.

108. Because the holding in *Mosley* was in effect at the time of the applicant's 2001 sentencing hearing, it was applicable to the applicant's case as a procedural provision and the trial court properly followed it.

109. Although procedural changes may work to a defendant's disadvantage, such changes do not violate the constitutional ex post facto prohibition. *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715 (1990).

110. However, any procedural change in art. 37.071 did not work to the applicant's disadvantage, because he received the same punishment without Plessner's testimony as he did with Plessner's testimony—the death penalty.

111. In the instant case, the trial court properly admitted Plessner's testimony as relevant to the jury's decision as to punishment and the admission of her testimony did not constitute application of ex post facto law and did not

create a constitutionally impermissible risk that the death penalty would be arbitrarily imposed. *See Mosley*, 983 S.W.2d at 262.

112. Applicant's thirty-third and thirty-fourth grounds for relief should be denied.

Applicant's Thirty-Fifth Ground for Relief

113. Because the applicant did not request a limiting instruction at the introduction of the complained-of evidence, he is procedurally barred from presenting his habeas claim. *See Wesbrook v. State*, 29 S.W.3d 103, 115 n.8 (Tex. Crim. App. 2000) (noting that party opposing evidence has burden of objecting and requesting limiting instruction at introduction of evidence).

114. Regardless, a "limiting instruction is not required where evidence can be considered on any relevant issue in the case." *Prystash v. State*, 3 S.W.3d 522, 532 (Tex. Crim. App. 1999) (holding that court did not err in refusing to limit jury's consideration of defendant's other bad acts to future dangerousness special issue because defendant's other bad acts were also relevant to mitigation issue).

115. As discussed within applicant's thirty-third and thirty-fourth grounds for relief, Carolyn Plessner's testimony was relevant as to the jury's sentencing decision.

116. Moreover, applicant's requested instructed was a misstatement of the law. *See* TEX. CODE CRIM. P. art. 37.0711.

117. Because the State offered no evidence of the victim's "comparative value," the applicant was

not entitled to his requested limiting, "comparative value" instruction. *See* TEX. CODE CRIM. P. arts. 36.19 and 38.05.

118. Finally, through the submitted "anti-sympathy" charge the jury was instructed not to be swayed from any mere sentiment, if, in fact, the jury derived mere sentiment from Plessner's testimony, and the jury's attention was properly focused on the factors relating to the moral culpability of the applicant. *See Tong v. State*, 25 S.W.2d 707, 710 (Tex. Crim. App. 2000).

119. Applicant's thirty-fifth ground for relief should be denied.

Applicant's Thirty-Sixth Ground for Relief

120. Because he raised the issue on direct appeal, applicant's thirty-sixth ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

121. Applicant's contention that Pradia's presence in court conveyed to the jury any specific information about a sentence is untenable given that the jury was never informed that Pradia was ever charged with or convicted of capital murder, much less that he received any specific sentence.

122. Further, error, if any, was cured by the trial court's Instruction to disregard. *Ovalle v. State*, 13 S. W.3d 774, 783 (Tex. Crim. App. 2000) (instruction to disregard generally cures any harm from improper question and answer).

123. Thus, the trial court properly denied the applicant's motion for mistrial. *See Guidry v.*

State, 9 S.W3d 133, 154 (Tex. Crim. App. 1999), *overruled on other grounds, Guidry v. Dretke*, 397 F.3d 306 (5th Cir. 2005) (instruction to disregard prosecutor's statement that codefendant received death penalty was prompt and sufficient to cure the error) (*citing Kinnamon v. State*, 791 S.W.2d 84, 89 (Tex. Crim. App. 1990)).

124. Moreover, assuming that the jury believed that Pradia had been tried for some offense relating to the primary capital murder, the fact that Pradia was no longer in prison could have created a doubt in the jury's mind concerning the severity of a death sentence for the same crime. *See Morris v. State*, 940 S.W.2d 610, 613-14 (Tex. Crim. App. 1996) (rejecting death row inmate's claim that trial court erred in excluding evidence that the State did not seek the death penalty against his two co-defendants because, inter alia, it is possible for two people committing the same crime to receive different sentences based on differing degrees of mitigation and evidence).

125. This court presumes that the jury followed the trial court's instruction to disregard Gattie's complained-of testimony, which "was not so inflammatory as to render a fair trial impossible," and where no evidence exists to indicate otherwise. *Moore v. State*, No. 74,059, slip op. at 16, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

126. Based on the foregoing, the trial court did not abuse its discretion in denying applicant's motion for mistrial.

127. Applicant's thirty-sixth ground for relief should be denied.

Applicant's Thirty-Seventh Ground for Relief

128. Because he raised the issue on direct appeal, applicant's thirty-seventh ground need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

129. During jury argument, counsel can properly summarize the evidence, make reasonable inferences from the evidence, answer argument of opposing counsel, and make a plea for law enforcement. *Harris v. State*, 784 S.W.2d 5, 12 (Tex. Crim. App. 1989).

130. Further, a defendant's failure to object to a jury argument or failure to pursue any objection to an adverse ruling forfeits his right to complain on appeal of the argument. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1998).

131. In this case, the prosecutor's argument was a proper response to trial counsel's prior argument that the applicant's actions were not deliberate.

132. The prosecutor made a reasonable inference that the applicant deliberately shot the complainant to avoid future identification and essentially argued that assessing the death penalty in the applicant's case would serve as deterrence for other robbers in similar circumstances. *See Jordan v. State*, 646 S. W.2d 946, 948 (Tex. Crim. App. 1983) (it is permissible to draw all reasonable, fair, and legitimate inferences from the facts in evidence); *see also Wolfe*

v. State, 917 S.W.2d 270, 281 (prosecutor may argue his opinions concerning issues in case so long as opinions are based on evidence in record and not unsworn testimony) (*quoting McKay v. State*, 707 S.W.2d 23 (Tex. Crim. App. 1985) (prosecutor's argument that "looks like it to me" concerning whether boot made certain print was based on evidence and not unsworn testimony)); *but see Rogers v. State*, 774 S.W.2d 247, 256 (Tex. Crim. App. 1989) (prohibiting arguments that death penalty does not deter crime and noting that question of general deterrence is immaterial to fact-finder), *overruled on other grounds, Peek v. State*, 106 S. W .3d 72 (Tex. Crim. App. 2003).

133. Further, the enacting of the Texas death penalty scheme which makes it a capital offense to commit a murder in the course and furtherance of an aggravated robbery predisposes the legislative intent to deter robbers from killing witnesses.

134. Also, the State made a proper plea for law enforcement by urging the jury to perform its sworn duty based on the evidence. *Moore v. State*, No. 74,059, slip op. at 12, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (citing Borjan v. State, 787 S. W.2d 53, 56 (Tex. Crim. App. 1990) (holding that prosecutor is allowed to argue that jury should deter specific crimes by its verdict).

135. Not only is the State's argument a proper plea for law enforcement in general, it is a proper

response to trial counsel's argument concerning the applicant being part of the community and, thus, a proper plea for law enforcement. *Borjan v. State*, 787 S. W .2d 53, 56 (Tex. Crim. App. 1990) (holding that argument on impact of jury's verdict on community constitutes proper plea for law enforcement).

136. The State's argument was not asking that the jury disregard the evidence in answering the special issues; it was instead urging the jury to consider the evidence and answer the special issues so that a death sentence would result (RR30 at 18-23, 45-54).

137. Finally, applicant falls to show that the State's argument was harmful, especially in light of the court's instruction that the jury decide the case based on the evidence and the law in the court's charge (RR30 at 54-57). *See Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997) (argument must be extreme or manifestly improper, or inject new facts into evidence, to constitute reversible error).

138. Based on the foregoing, the applicant's thirty-seventh ground for relief is without merit and should be denied.

Applicant's Thirty-Eighth Through Fortieth Grounds for Relief

139. Because he raised the issue on direct appeal, applicant's thirty-eighth through fortieth grounds need not be considered in this habeas proceeding and should be denied. *Ex parte Acosta*, 672 S.W.2d 470, 772 (Tex. Crim. App. 1984).

140. In *Apprendi*, the Supreme Court held that construing a state statute in relation to the due process clause of the Fourteenth Amendment also requires that any fact, other than a prior conviction, that increases the sentence beyond the statutorily-prescribed maximum must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 489, 120 S. Ct. 2348, 2362-63 (2000).

141. However, the decision in *Apprendi* is inapplicable to the Texas death penalty scheme, including the mitigation issue. To argue that the absence of a burden of proof on the mitigation issue is constitutionally infirm is to read the Court's decision in *Apprendi* too broadly; *Apprendi* is inapplicable to TEX. CODE CRIM. P. art. 37.071.

142. Under art. 37.071, the "prescribed statutory maximum" is death; there are no statutory enhancements. *See Allen v. State*, 108 S.W.3d 281, 285 (Tex. Crim. App. 2003) (holding that nothing jury or judge decided at punishment in capital trial could enhance defendant's "prescribed statutory maximum" beyond prescribed range); *see also Resendiz v. State*, 112 S.W.3d 541, 548-50 (Tex. Crim. App. 2003).

143. A jury's negative finding on the mitigation special issue does not raise the "prescribed statutory maximum" of death (whereas a jury's affirmative finding on the mitigation special issue lowers the "prescribed statutory maximum" to life). *Moore v. State*, No. 74,059, slip op. at 18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004).

144. Also, as noted on direct appeal of the applicant's case, the Court of Criminal Appeals has previously addressed and rejected claims that the mitigation special issue is allegedly infirm as a matter of federal constitutional law because of its lack of a burden of proof, and that the mitigation special issue violates U.S. CONST. amend. VIII, because it allegedly prevents meaningful appellate review of the jury's determination. *Moore v. State*, No. 74,059, slip op. at 17, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Jackson v. State*, 33 S.W.3d 828, 840-1 (Tex. Crim. App. 2000) *and Prystash v. State*, 3 S.W.3d 522, 535-6 (Tex. Crim. App. 1999)); *see also Resendiz*, 112 S.W.3d at 548-50.

145. Further, the Court of Criminal Appeals has previously rejected claims of an alleged statutory infirmity when art. 44.251 is considered in conjunction with art. 37.071, § 2(3). *Moore v. State*, No. 74,059, slip op. at 18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S. Ct. 312 (2004) (*citing Tong v. State*, 25 S.W.3d 707, 715 (Tex. Crim. App. 2000); *see also Jackson*, 33 S.W.3d at 840-1; *Prystash*, 3 S.W.3d at 535-6.

146. The mitigation issue, as given, does not violate U.S. CONST. amend. VIII, based of an alleged lack of meaningful appellate review. *McFarland v. State*, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W.2d

614 (Tex. Crim. App. 1996) (appellate review of mitigation issue not constitutionally required).

147. In the instant case, the applicant was not assessed punishment beyond the maximum allowable punishment, and consideration of mitigating evidence for the purpose of punishment cannot be considered an element of the offense requiring a burden of proof, thus, the holding of *Apprendi* is inapplicable to the applicant's case and to the mitigation issue of the Texas death penalty statute.

148. Based on the foregoing, the applicant's thirty-eighth, thirty-ninth, and fortieth grounds for relief are without merit and should be denied.

Applicant's Forty-First and Forty-Second Grounds for Relief

149. Applicant cannot complain or show prejudice based on any alleged inordinate delay from the time of his conviction to his, as yet, unscheduled execution due to his multiple and continued efforts to attain appellate and/or post-conviction relief in state and federal courts.

150. Regardless, valid Lackey claims are not conceptually possible: "[f]urthermore, even assuming a valid *Lackey*-claim is conceptually possible, [fn omitted] the execution of a murderer whose crime otherwise merited the death sentence would not rise to the level of a fundamental miscarriage of justice. *See McKenzie*, 57 F.3d at 1467 ("[I]t is unclear to us whether, even if it were held that delay in the imposition of the death penalty constitutes cruel and unusual punishment, commutation

of the death penalty will turn out to be the appropriate remedy.") According to Fearance's own theory, he has already suffered the cruel and unusual punishment occasioned by delay; executing him immediately would not add to this type of punishment." *Fearance v. Scott*, 56 F.3d 633, 638 (5th Cir. 1995).

151. Subsequently, the Court of Criminal Appeals addressed and rejected the notion of a Lackey claim in which a defendant complained of cruel and unusual punishment, based on his two decades of incarceration on death row. *Moore v. State*, No. 74,059, slip op. at 18, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 543 U.S. 931, 124 S.Ct. 312 (2004) (*citing Bell v. State*, 938 S.W.2d 38, 52-3 (Tex. Crim. App. 1996)).

152. In *Bell*, the Court of Criminal Appeals held: "If this Court were to hold that executing an inmate after a threshold amount of time on death row would per se violate the Eighth Amendment, such a holding would undoubtedly encourage inmates to delay their appeals as much as possible. Even assuming the torturous effects of appellate delay, the hope of a life sentence coupled with the torturous anxiety of waiting would arguably be preferable to a certain death. We refuse to encourage inmates to prolong their appeals on hope that they could receive a life sentence if they keep their appeals alive for a certain number of years. The arbitrary results that would follow such tactics, as well as the difficulties in discerning a threshold period of

time, compound the problematic nature of appellant's claim. We decline to hold that, because of appellant's years spent waiting his execution, his execution would violate the Eighth Amendment's ban against cruel and unusual punishment." *Bell v. State*, 938 S.W.2d 38, 53 (Tex. Crim. App. 1996).

153. Applicant falls to show that a delay from the time of his 2001 death sentence to the present is per se cruel and unusual punishment, much less that the delay is cruel and unusual punishment for him in particular; thus, applicant falls to show a constitutional violation.

154. The State of Texas has not forfeited its right to carry out applicant's sentence based on his valid conviction.

155. Neither the State nor the courts should be faulted for thoroughly addressing and reviewing applicant's appellate claims.

156. Further, trial counsel are not ineffective for failing to present a meritless *Lackey* claim; in particular, counsel are not ineffective for failing to present such meritless claim prior to applicant's death sentence.

157. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

158. Applicant's forty-first and forty-second grounds for relief should be denied.

Applicant's Forty-Third and Forty-Fourth Grounds for Relief

159. In order to show a Brady violation, applicant must show that the State suppressed evidence favorable to the accused where the evidence is material either to guilt or punishment.

160. Impeachment and exculpatory evidence fall within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L.Ed.2d 104 (1972).

161. Even accepting that certain evidence is favorable to the defense, it still must be determined whether such evidence is material. *Crawford v. State*, 617 S.W.2d 925, 931 (Tex. Crim. App. 1980).

162. The standard of materiality of undisclosed evidence is whether the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985) (evidence is material where there is reasonable probability that, if disclosed, result of proceeding would have been different).

163. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (Court of Criminal Appeals adopted materiality standard set forth by Supreme Court in *Bagley*).

164. The mere possibility that undisclosed information might have helped the defense or might have affected the outcome of the trial does not

establish materiality. *Agurs*, 427 U.S. at 110, 96 S. Ct. at 2400; *Stone v. State*, 583 S.W.2d 410 (Tex. Crim. App. 1979).

165. In determining materiality, the omission must be evaluated in the context of the entire record; constitutional error is committed only if the omitted evidence creates a reasonable doubt that did not otherwise exist. *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980).

166. Generally, if a prosecutor opens his files for examination by defense counsel, he fulfills his duty to disclose exculpatory evidence even if defense counsel does not avail himself of the opportunity to read and/or further explore such information. Id.

167. Further, the suppressed evidence must also be admissible. *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex. Crim. App. 1993).

168. Even assuming that the alleged information concerning Dr. Van Dusen was favorable to applicant and was not disclosed, applicant's ground for relief is without merit because applicant fails to demonstrate that the information was material. *See Crawford*, 617 S.W.2d at 931. Van Dusen's testimony concerning the cause of the complainant's death was significant only with respect to the issue of the applicant's guilt. The applicant's guilt concerning the instant offense was resolved and not at issue during the applicant's rehearing on punishment. Further, the substance of Dr. Van Dusen's testimony was garnered solely from the 1980 autopsy report of Dr. Bucklin whose conclusions are not now challenged by

the applicant. Therefore, the allegedly omitted evidence neither creates a reasonable doubt concerning the applicant's guilt that did not otherwise exist, nor is there a reasonable probability that, if disclosed, the results of the applicant's punishment hearing would have been different. *Bagley*, 473 U.S. at 684, 105 S.Ct. at 3385.

169. Similarly, the applicant's ground for relief alleging ineffective assistance of counsel on appeal fails. As noted above, the applicant in the motion for new trial hearing waived the instant complaint for direct appeal purposes. Accordingly, the applicant is procedurally barred from advancing his ground for habeas relief. *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crlm. App. 1978).

170. Further, appellate counsel cannot be held ineffective for choosing not to advance a meritless appellate claim, as appellate counsel does not have a constitutional duty to raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983) (courts cannot second-guess an appellate attorney's professional judgment to brief only stronger points of error).

171. Moreover, applicant offers no proof that, but for appellate counsel's alleged errors, the results of the proceeding would have been different. *See Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App: 1994) (*Strickland* standard applies to appellate counsel as well as trial counsel).

172. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

173. Based on the foregoing, the applicant's forty-third and forty-fourth grounds for relief are without merit and should be denied.

Applicant's Forty-Fifth and Forty-Sixth Grounds for Relief

174. As previously noted, applicant's claims of ineffective assistance of trial counsel are without merit and should be denied. Therefore, applicant fails to show any cumulative effect of alleged error and the applicant's forty-fifth ground for relief should be denied. *Ex parte Barber*, 879 S. W.2d 889 (Tex. Crim. App. 1994) (holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas).

175. Accordingly, the applicant falls to show ineffective assistance of appellate counsel based on appellate counsel not presenting such claims on direct appeal. *See Ex parte Butler*, 884 S. W .2d 782, 783 (Tex. Crim. App. 1994) (*Strickland* standard applies to appellate counsel as well as trial counsel).

176. Applicant fails to rebut the presumption that his trial and appellate counsel did not err in an unstrategic manner.

177. Based on the foregoing, the applicant's forty-fifth and forty-sixth grounds for relief are without merit and should be denied.

Applicant's Forty-Seventh Ground for Relief

178. As previously shown, applicant's alleged errors at trial and on direct appeal are meritless.

179. Thus, applicant falls to show a violation of his constitutional rights based on the cumulative effect of such alleged, meritless claims. *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994) (holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas).

180. Applicant's forty-seventh ground for relief is without merit and should be denied.

Applicant's Forty-Eighth Ground for Relief

181. Applicant is procedurally barred from raising his forty-eighth ground for relief because the record does not reflect any objection to the Texas clemency procedures at trial. *See Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

182. Further, applicant's claim is not ripe because applicant has not yet filed a petition with the Board of Pardons and Paroles and the Governor of the State of Texas requesting clemency from his 2001 death sentence.

183. Moreover, Texas's clemency procedures do not violate due process. *See Faultier v. Texas*, 178 F.3d 343 (5th Cir. 1999).

184. Applicant fails to show that the Texas clemency process violates due process in general or as applied to him.

185. Applicant's forty-eighth ground for relief is meritless and should be denied.

Conclusion

186. Applicant's grounds for relief should be ~~denied~~ *granted in part and denied in part.*

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 31433-C. *Grounds 4-48*

Date: Feb 6, 2014

/s/_____
HON. SUSAN BAETZ BROWN
Presiding Judge
185th District Court
Harris County, Texas

Supreme Court, U.S.
FILED
MAR 18 2015
OFFICE OF THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Div.

JEREMY C. GREENWELL
Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Austin, Texas 78711
(512) 936-1400
jeremy.greenwell@texasattorneygeneral.gov

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Texas's standard for determining if a capital defendant is intellectually disabled violates the Eight Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) by not strictly applying the most current medical definition of intellectual disability;

2. Whether the execution of a condemned individual, who has successfully availed himself of the appellate process for over thirty years, violates the Eighth Amendment's prohibition against cruel and unusual punishment due to the length of his incarceration on death row.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Index of Authorities iii

Reasons to Deny the Petition 1

Statement of the Case 3

I. THE FACTS OF MOORE'S CAPITAL MURDER 3

II. RELEVANT PROCEDURAL HISTORY 4

Argument 7

I. THE QUESTIONS MOORE PRESENTS FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION AND ARE MORE APPROPRIATE FOR FEDERAL HABEAS REVIEW 7

II. THE STATE COURT'S REJECTION OF MOORE'S *ATKINS* CLAIM IS NOT IN CONFLICT WITH THE EIGHTH AMENDMENT OR THIS COURT'S PRECEDENT 9

A. *Atkins* did not require the adoption of any particular methodology for assessing claims of intellectual disability 11

B. The test employed by the TCCA for assessing claims of intellectual disability is consistent with this Court's precedent 15

III MOORE'S LENGTHY STAY ON DEATH ROW DOES NOT RENDER HIS SENTENCE UNCONSTITUTIONAL 20

CONCLUSION 25

INDEX OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) ..... *passim*

Bell v. Cone, 535 U.S. 685 (2002) 8

Bell v. State, 938 S.W.2d 35 (Tex. Crim. App. 1996) ... 22

Bobby v. Bies, 556 U.S. 825 (2009) 12, 13

Carter v. Johnson, 131 F.3d 452 (5th Cir. 1997) 21

Chester v. Thaler, 666 F.3d 340 (5th Cir. 2011) 13, 17

Clark v. Quarterman, 457 F.3d 441 (5th Cir. 2006) 13

Coleman v. Balkcom, 451 U.S. 949 (1981) 24

Correll v. Florida, __ S. Ct. __, 2015 WL 6111441 (2015) 20

Elledge v. Florida, 525 U.S. 944 (1998) 20

Ex parte Bell, 152 S.W.3d 103 (Tex. Crim. App. 2004) 19

Ex parte Briseño, 135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex parte Bush, 695 So.2d 138 (Ala. 1997) 22

Ex parte Cathey, 451 S.W.3d 1, 15 n.40 (Tex. Crim. App. 2014) 11, 15, 16

Ex parte DeBlanc, 2005 WL 768441, at *1 (Tex. Crim. App. Mar. 16, 2005) 19

Ex parte Modden, 147 S.W.3d 293 (Tex. Crim. App. 2004) 19

Ex parte Sosa, 364 S.W.3d 889 (Tex. Crim. App. 2012) 16

Ex parte Valdez, 158 S.W.3d 438 (Tex. Crim. App. 2004) 19

Ex parte Van Alstyne, 239 S.W.3d 815 (Tex. Crim. App. 2007) 6, 19

Felder v. Johnson, 180 F.3d 206 (5th Cir. 1999) 22

Free v. Peters, 50 F.3d 1362 (7th Cir. 1995) 21

Greene v. Fisher, 132 S. Ct. 38 (2011) 8

Hall v. Florida, 134 S. Ct. 1986 (2014) ..... *passim*

Harrington v. Richter, 562 U.S. 86 (2011) 8

Hearn v. Thaler, 669 F.3d 265 (5th Cir. 2012) 14

Henderson v. Stephens, 791 F.3d 567 (5th Cir. 2015) .. 18

Hitchcock v. State, 578 S.2d 685 (Fla. 1990) 22

Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012) 18

Johns v. Bowersox, 203 F.3d 538 (8th Cir. 2000) 21

Johnson v. Bredesen, 558 U.S. 1067 (2009) 20

Kansas v. Crane, 534 U.S. 407 (2002) 14

Kansas v. Hendricks, 521 U.S. 346 (1997) 12

Knight v. Florida, 528 U.S. 990 (1999) 20, 24, 25

Kyles v. Whitley, 498 U.S. 931 (1990) 8

Lackey v. Johnson, 83 F.3d 116 (5th Cir. 1996) 20, 21

Lackey v. Texas, 514 U.S. 1045 (1995) 20, 21

Larry v. Branker, 552 F.3d 356 (4th Cir. 2009) 18

Mays v. Stephens, 757 F.3d 211 (5th Cir. 2014) 14, 18

McKenzie v. Day, 57 F.3d 1493 (9th Cir. 1995) 21

Moore v. State, 771 N.E.2d 46 (Ind. 2002) 22

People v. Fry, 959 P.2d 183 (Cal. 1998) 22

People v. Sims, 736 N.E.2d 1092 (Ill. 2000) 22

Reed v. Quarterman, 504 F.3d 465 (5th Cir. 2007) 21

Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990) 21

Ross v. Moffitt, 417 U.S. 600 (1974).....7

ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007).....21

Smith v. Arizona, 552 U.S. 985 (2007).....20

Smith v. Mahoney, 611 F.3d 978 (9th Cir. 2010).....21

Smith v. State, 74 S.W.3d 868 (Tex. Crim. App. 2002).....21

Stafford v. Ward, 59 F.3d 1025 (10th Cir. 1995).....21

State v. Schackart, 947 P.2d 315 (Ari. 1997).....22

Thompson v. McNeil, 129 S. Ct. 1299 (2009).....20

Turner v. Jabe, 58 F.3d 924 (4th Cir. 1995).....22, 24, 25

United States v. Wilson, 922 F. Supp. 2d 334 (E.D. N.Y. 2013).....19

White v. Johnson, 79 F.3d 432 (5th Cir. 1996).....22

Valle v. Florida, 132 S. Ct. 1 (2011).....20

STATUTES

U.S. amend VIII ..... *passim*

Tex. Code. Crim. Proc. Ann. art. 11.071, § 9(f)(1) 6

Tex. Health & Safety Code § 591.003 15

RULES

Supreme Court Rule 10 ..... 1, 7

MISCELLANEOUS

American Association on Intellectual and Developmental Disabilities (AAIDD) ..... *passim*

American Association on Mental Retardation (AAMR) 11, 13

American Psychiatric Association (APA) ..... *passim*

APA, Diagnostic and Statistical Manual of Mental Disorders xxii, xxvii (4th ed. 1994) 13

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) ..... *passim*

Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 25 (1995) 25

REASONS TO DENY THE PETITION

Petitioner Bobby James Moore was convicted and sentenced to death in 1980 for the capital murder of seventy-year-old James McCarble. Following a grant of federal habeas relief, Moore was given a new punishment hearing in February 2001 where he again received a sentence of death. Moore unsuccessfully challenged his sentence on direct appeal and on state collateral review. He now seeks certiorari review of the Texas Court of Criminal Appeals' (TCCA) denial of habeas relief. Specifically, because he disagrees with the court's findings that he is not intellectually disabled and thus ineligible for the death penalty, Moore asks this Court to declare Texas's entire framework for evaluating intellectual disability claims in capital cases unconstitutional. He also urges this Court to find that the length of time he has been incarcerated on death row somehow renders his sentence unconstitutional. Neither is a compelling reason for this Court to review his case. *See* Sup. Ct. R. 10.

1. Moore has yet to seek federal habeas relief, choosing instead to seek certiorari immediately following the denial of state habeas relief. But given the fact-intensive nature of Moore's intellectual disability allegation, along with the sheer length of the state court record, the more appropriate avenue for consideration of his federal constitutional claims would be federal habeas proceedings. Moore's attempt to circumvent the strict standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) during federal habeas review should not be rewarded.

2. Moore's assertion that the state courts must rely on current medical standards when evaluating claims of intellectual disability under *Atkins* is misleading. In *Atkins*, this Court specifically left to the individual states the task of developing appropriate ways to enforce the constitutional restriction against executing intellectually disabled offenders. Nothing in either *Atkins* or *Hall* requires states to employ clinical definitions of intellectual disability, much less obliges them to employ the same underlying analysis that professional organizations currently use to determine which patients meet their definition of intellectual disability. Even so, the standard used by the TCCA to evaluate such allegations is, contrary to Moore's belief, remarkably similar to the current definition espoused by the medical community, and is consistent with this Court's opinions in both *Atkins* and *Hall*.

3. Finally, Moore provides little support for the proposition that a death row inmate can diligently exercise his right to challenge his conviction both directly and collaterally, and then argue that the resultant delay renders his sentence cruel and unusual. Because any such delay is largely of the defendant's own making, no court—state or federal—has held that a lengthy stay on death row renders his sentence unconstitutional under the Eighth Amendment.

For these reasons, this Court should deny the instant petition for writ of certiorari.

STATEMENT OF THE CASE

I. THE FACTS OF MOORE'S CAPITAL MURDER.

The TCCA adequately summarized the facts of the offense in its unpublished opinion on direct appeal:

> The record reflects that on April 25, 1980, [Moore] and two accomplices, Anthony Pradia and Willie Koonce, drove around looking for a place to commit a robbery. They came upon the Birdsall Super Market and Pradia went inside the store to "check it out." After Pradia reported seeing an elderly man and woman in the courtesy booth, and a pregnant woman at the registers, they decided that the store would be a good choice and subsequently discussed their respective roles in the robbery. [Moore] carried a shotgun, while Pradia carried a pistol. The three men entered the store.
>
> [Moore] and Koonce walked up to the courtesy booth. Koonce entered the booth and told James McCarble and Edna Scott, who were working inside the booth, that they were being robbed and demanded money. According to several witnesses, [Moore] lifted his shotgun to his shoulder and pointed it at McCarble and Scott through the courtesy booth window. When Scott yelled out, [Moore] pointed the gun at McCarble, looked down the barrel while raised on his toes, and shot McCarble in the

> head. Arthur Moreno, who was working as a stocker in the store at the time of the robbery, testified that when [Moore] shot McCarble, McCarble's hands were in the air and McCarble made no sudden moves before he was shot.

Moore v. State, No. 74,059, slip op. at 2 (Tex. Crim. App. Jan. 14, 2004) (unpublished).

II. RELEVANT PROCEDURAL HISTORY.

Moore was indicted, convicted, and sentenced to death in July 1980 for the robbery and murder of James McCarble. X SHCR 3809 (Judgment); X SHCR 3810 (Sentence).[1] His conviction and sentence were affirmed on direct appeal by the TCCA. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. October 9, 1985), *cert. denied*, 474 U.S. 1113 (1986). Following state and federal habeas proceedings, a federal district court found that Moore was denied the right to the effective assistance of counsel during the punishment phase and granted federal habeas relief. The Fifth Circuit affirmed the grant of habeas relief and ordered that Moore either be given a new punishment hearing or a sentence less than death. *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999). Moore was given a new sentencing hearing in February 2001, where he again received a sentence of death. X SHCR 3812 (Sentence). The TCCA affirmed this sentence on direct appeal. *Moore v. State*, No.

---

[1] "SHCR" refers to the state habeas Clerk's Record—the transcript of pleadings and documents filed with the court during Moore's state habeas proceeding—and is preceded by volume number and followed by the relevant page numbers.

74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (unpublished).

While his direct appeal was still pending, Moore filed a state application for writ of habeas corpus in the trial court challenging his 2001 punishment retrial and sentence. I SHCR 2-422. Moore's application raised a total of forty-eight claims for relief, including his allegations that the Eighth Amendment barred his execution due to (1) his intellectual disability under *Atkins*, and (2) the length of time he has already spent on death row. *Id.* at 48-61, 202-215. In January 2014, the trial court held a two-day evidentiary hearing on Moore's *Atkins* claim and heard argument on the evidence.

Following the evidentiary hearing, the trial court entered 184 findings of fact and conclusions of law recommending that habeas relief be granted on Moore's *Atkins* allegation. *See* Pet. 127a-203a; X SHCR 3558-3627 Specifically, after considering the numerous pleadings and exhibits presented by both parties, as well as the trial court record and the testimony of the witnesses presented at the evidentiary hearing, the trial court concluded that Moore had met the definition of intellectual disability as defined by the current guidelines of the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association (APA). Pet. 202a. The court also entered findings and conclusions recommending that relief be denied on all of the remaining non-*Atkins* grounds, including his allegation concerning his prolonged confinement on death row. Pet. 279a-281a.

Thereafter, the entire record was transmitted to the TCCA and the case was set for the court to address the *Atkins* claim.[2] *See* Tex. Code. Crim. Proc. Ann. art. 11.071, §§ 9(f)(1), 11. Finding that the trial court erred in employing the clinical definition of intellectual disability presently used by the AAIDD and APA rather than the legal definition adopted by the court in *Ex parte Briseño*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004), the TCCA rejected the trial court's findings and conclusions concerning *Atkins*.[3] Pet. 5a-7a; *Ex parte Moore*, 470 S.W.3d 481,486 (Tex. Crim. App. Sept. 16, 2015). Although it "may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseño* were decided," the court stated, the medical community does not ultimately make the determination of whether an individual "is exempt from execution under *Atkins*." Pet. 6a-7a. Rather, that decision rests with the TCCA itself, which continues to follow the definition adopted in *Briseño*, as that definition remains "adequately informed by the medical community's diagnostic framework." Pet. 7a (citing *Hall*, 134 S. Ct. at 2000).

---

[2] In Texas, the trial court is the "original factfinder" in habeas corpus proceedings and the TCCA is the "ultimate factfinder." *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007) (per curiam). As a matter of course, the TCCA pays great deference to the trial court's recommended findings of fact and conclusions of law, as long as they are supported by the record. *Id.*

[3] The TCCA affirmed the trial court's denial of the remainder of Moore's allegations, including his Eighth Amendment challenge regarding the amount of time he has been incarcerated on death row. Pet. 92a-93a.

For this reason, the TCCA did not adopt the findings and conclusions of the trial court, and instead assumed its role as the ultimate factfinder. Pet. 12a. After an independent review of the entire record, the court concluded that the record failed to support the trial court's findings or conclusions concerning Moore's *Atkins* allegation. *Id.* As the court explained, the trial court "appears to have either not considered, or unreasonably disregarded, a vast array of evidence in [the] lengthy record that cannot rationally be squared with a finding of intellectual-disability." *Id.* As such, the court denied Moore habeas relief. Moore now seeks certiorari review of this decision.

ARGUMENT

I. THE QUESTIONS MOORE PRESENTS FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION AND ARE MORE APPROPRIATE FOR FEDERAL HABEAS REVIEW.

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

As shown below, no compelling reason exists to review this case. Even if the Court were inclined to grant review, it need not do so in the instant proceeding

because Moore has yet to seek federal habeas corpus relief. As Justice Stevens explained:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of a stay).

In his petition, Moore suggests that the Court should consider his claims now because it will more difficult for him to overcome the "high hurdles" imposed during federal habeas review as a result of AEDPA. Pet. 34. But this argument is misguided. The AEDPA standards are "'difficult to meet[]' because the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error correction." *Greene v. Fisher*, 132 S. Ct. 38, 43 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to [. . .] to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Granting Moore's request would frustrate this clear purpose.

Further, consideration of Moore's state collateral review proceedings by this Court is particularly inapt at

this juncture given the length of his trial, appeal, and state habeas proceedings, particularly the multitude of witnesses (including the nine who testified at the evidentiary hearing) whose testimony concerns Moore's *Atkins/Hall* allegation.[4] Although both the TCCA and Moore admirably attempted to summarize the evidence presented in these proceedings, it is likely that many of the relevant facts underlying the decision of the state habeas court and the TCCA were omitted. Where the state habeas proceeding generated facts too plentiful to be given full review in the limited context of a petition for writ of certiorari, it is undoubtedly more appropriate that litigation of this type of claim first occur in federal district court.

This Court should therefore decline to permit Moore to circumvent AEDPA by granting his petition at this premature juncture—especially since his petition presents no important questions of law to justify the exercise of certiorari jurisdiction in the first place.

II. THE STATE COURT'S REJECTION OF MOORE'S *ATKINS* CLAIM IS NOT IN CONFLICT WITH THE EIGHTH AMENDMENT OR THIS COURT'S PRECEDENT.

Moore's position is simple: he contends that under this Court's decisions in *Atkins* and later in *Hall*, the Eighth Amendment bars the execution of a prisoner who is deemed to be intellectually disabled under the most current medical standards. Pet. 10, 12. By using

---

[4] Indeed, the TCCA's recitation of these facts took up over half the court's lengthy opinion on the *Atkins/Hall* allegation alone. *See Ex parte Moore*, 470 S.W.3d at 490-513.

an "outdated" definition of intellectual disability in rejecting his *Atkins* claim, Moore asserts that the TCCA eschewed this Court's requirement that current medical standards be consulted when making an intellectual-disability inquiry, and has thus abdicated its obligation to enforce the Eighth Amendment in general. *Id.* at 10-12. He urges the Court to grant review so that *Atkins* and *Hall* "do not become dead letters" in Texas. *Id.* at 11.

Moore's claim fails for two reasons. First, this Court has never held that states must employ clinical definitions of intellectual disability, let alone that they must employ the same underlying analysis that professional organizations (like the AAIDD or the APA) use to determine which patients meet each prong of those organizations' definitions. To do so would take the legal decision of whether a defendant is intellectually disabled out of the hands of the factfinder and place it in the hands of medical professionals—a result that was not required by this Court in either *Atkins* or *Hall*. *Hall*, 134 S. Ct. at 2000.

Second, the "outdated" standard that the TCCA uses to evaluate allegations of intellectual disability is, contrary to Moore's belief, entirely consistent with this Court's opinions in *Atkins* and *Hall*. Texas's legal definition of intellectual disability was derived from a medical definition that the AAIDD had previously advocated, and it remains consistent with the current definition of intellectual disability used by the medical community and the AAIDD. *See Hall*, 134 S. Ct. at 1994 (citing *Atkins*, 536 U.S. at 308 n.3); AAIDD Manual at 5. For these reasons, this Court's review is unwarranted.

A. *Atkins* did not require the adoption of any particular methodology for assessing claims of intellectual disability.

In *Atkins*, the Court held that the Eighth Amendment prohibits the execution of intellectually disabled offenders, 536 U.S. at 321, but it stopped short of clearly establishing which offenders would qualify. Instead, the Court recognized that there was "serious disagreement" when it came to "determining which offenders are in fact [intellectually disabled]." *Id.* at 317 ("Not all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus.").

In providing guidance regarding the definition of intellectual disability, the Court cited with approval the American Association on Mental Retardation (AAMR)[5] and APA definitions of intellectual disability, which require (1) significantly subaverage general intellectual functioning, (2) concurrent significant limitations in adaptive functioning, and (3) onset before age eighteen. *Id.* at 309 n.3. Rather than formulating a rule for what subset of those who claimed to be intellectually disabled would be ineligible for the death penalty, however, the

---

[5] The AAMR is a professional non-profit association that advocates for the rights of the mentally impaired and those with developmental disabilities. *Ex parte Cathey*, 451 S.W.3d 1, 15 n.40 (Tex. Crim. App. 2014). In 2007, it changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD), reflecting the change in terminology from "mental retardation" to "intellectual disability." *Hall*, 134 S. Ct. at 1990, 2003 n.1.

Court expressly "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317. This is consistent with the Court's prior precedent that it has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) (concerning when someone may be civilly committed due to mental illness).[6]

Underlying his petition is Moore's belief that the legal definition of intellectual disability for Eighth Amendment purposes should match the clinical definition. To the contrary, this Court's precedent explicitly recognizes that legal and clinical standards are not always the same. *See, e.g., Hendricks*, 521 U.S. at 359 (noting that legal definitions of "insanity" and "competency" "vary substantially from their psychiatric counterparts"). "Legal definitions . . . which must 'take into account such issues as individual responsibility . . . and competency,' need not mirror those advanced by the medical profession." *Id.* (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxii, xxvii (4th ed. 1994)).

---

[6] Notably, the Court has rejected the notion that *Atkins* only delegated to the states procedural matters regarding intellectual disability. *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (stating that *Atkins* "did not provide definitive procedural or substantive guides for determining whether a person who claims [intellectual disability], 'will be so impaired as to fall [within *Atkins*'s compass].") (citation omitted).

While the *Atkins* Court cited with approval the AAMR and APA definitions, it did not hold that states must follow those clinical definitions or associated clinical protocol. *Atkins*, 536 U. S. at 309 n. 3, 317 n. 22; *see also Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006) (dismissing the notion that *Atkins* created any criteria for a state's definition of intellectual disability). As the Fifth Circuit explained:

> *Atkins* clearly did not hold. . . that states must employ the AAMR or APA definitions of [intellectual disability], let alone that they must employ the same underlying clinical analysis that the AAMR or APA use to determine which patients meet each prong of those organizations' definitions; the absence of such a holding is determinative here.

Chester v. Thaler, 666 F.3d 340, 347-48 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 525 (2012) (Mem.). Rather, the Court's references to the AAMR and APA definitions was merely a description of a subset of all definitions—specifically those in use by clinicians and service providers—which stops short of requiring statutory, criminal justice definitions to follow the same pattern. Otherwise, Moore would have to explain why the Court failed to adopt such clinical standards when it had the opportunity to do so, or why the Court has since held that it did not provide a substantive definition. *See Bobby*, 556 U.S. at 831.

Citing *Hall*, Moore argues that because "clinical definitions of intellectual disability . . . were a

fundamental premise of *Atkins*," individual states may not "go against unanimous professional consensus" nor "disregard established medical practice" in making its legal determination. Pet. 13 (quoting *Hall*, 134 S. Ct. at 1995, 2000). But his reliance on *Hall* is again misplaced. Although the Court noted that the states do not have "complete autonomy to define intellectual disability as they wish" and read *Atkins* "to provide substantial guidance on the definition of intellectual disability," the Court nonetheless determined that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 1999-2000. As the Court recognized, "the science of psychiatry . . . informs but does not control ultimate legal determinations." *Id.* (citing *Kansas v. Crane*, 534 U.S. 407, 413 (2002)).

Furthermore, *Hall* "exclusively addresses the constitutionality of mandatory, strict IQ test cutoffs[,] and "Texas has never adopted the bright-line cutoff at issue in *Hall*." *See Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014) (citing *Hearn v. Thaler*, 669 F.3d 265, 268-69 (5th Cir. 2012)), *cert. denied*, 135 S. Ct. 951 (2015) (Mem.). As such, *Hall* provides no support for Moore's insistence that the legal determination of intellectual disability must strictly adhere to most recent clinical definition.

B. The test employed by the TCCA for assessing claims of intellectual disability is consistent with this Court's precedent.

In response to *Atkins*, the TCCA established guidelines for determining whether a defendant has "that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Ex parte Briseño*, 135 S.W.3d at 6. The court adopted the definition of intellectual disability then in use by the AAMR and the similar definition of intellectual disability contained in the Texas Health and Safety Code. *See Briseño*, 135 S.W.3d at 5-8; Tex. Health & Safety Code §§ 591.003(7-a), (13). Under this definition, a defendant must prove by a preponderance of the evidence the following three-prongs: (1) significantly subaverage general intellectual functioning, generally shown by an IQ of about 70 or below[7] (approximately 2 standard deviations below the mean), (2) accompanied by related limitations in adaptive functioning, (3) the onset of which occurs prior to the age of eighteen. *Briseño*, 135 S.W.3d at 6-7, n.24.

As discussed previously, *Atkins* did not require that evidence of adaptive functioning be assessed under a particular medical diagnostic framework like Moore now suggests. Nevertheless, recognizing that the

---

[7] Texas courts recognize that mental health professionals are flexible in their assessment of intellectual disability; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as intellectually disabled while a person whose IQ tests below 70 may not be disabled. *See Cathey*, 451 S.W.3d at 10; *Briseño*, 135 S.W.3dat 7 n.24.

adaptive criteria are "exceedingly subjective," the TCCA provided seven additional "evidentiary factors" that factfinders might also use in determining whether an individual is intellectually disabled. *Id.* at 8-9.[8] Each of these factors are consistent with this Court's opinion in *Atkins* and are adequately "informed by the medical community's diagnostic framework." *See Hall*, 134 S. Ct. at 2000.

The first factor—whether those who knew the defendant at a young age believed he was intellectually disabled and acted accordingly—actually reflects the AAIDD definition, which requires the presence of adaptive deficits before age eighteen. *Atkins*, 536 U.S. at 308 n.3; *Briseño*, 135 S.W.3d at 7-8. And the next three factors—impulsiveness, leadership, and rational responses to external stimuli—all come from *Atkins*. *Briseño*, 135 S.W.3d at 8. The diminished capacity to control impulses is mentioned repeatedly by the Court as reducing the culpability of the intellectually disabled. *Atkins*, 536 U.S. at 306, 318, 320. The Court also stated that, in group settings, the intellectually disabled are

---

[8] The TCCA did not make consideration of any or all of the *Briseño* factors mandatory. *Ex parte Cathey*, 451 S.W.3d at 11 n.22; *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012). The *Briseño* factors were designed to assist factfinders in making the "relatedness" determination—that is, whether a defendant's adaptive limitations are related to a deficit in intellectual functioning or some other cause. *Briseño*, 135 S.W.3d at 8. They also reflect the court's concern that the guidelines used by mental health professionals and advocacy groups should not be considered in isolation, but rather in the context of the concerns expressed by this Court in *Atkins*. *See Sosa*, 364 S.W.3d at 892; *Cathey*, 451 S.W.3d at 11 n.22.

typically followers, not leaders. *Id.* at 318. Whether an individual has rational responses to external stimuli can be seen in the Court's focus on an intellectually disabled person's capacity to understand the reactions of others, to engage in logical reasoning, and to process information, all of which are referenced throughout the Court's opinion. *Id.* at 306, 318, 320.

The fifth factor, communication, is especially relevant, as it is part of the AAIDD and APA definitions of adaptive functioning. *Atkins*, 536 U.S. at 308 n.3; *Briseño*, 135 S.W.3d at 8. The diminished capacity to communicate was relied on in *Atkins* to justify a categorical ban, as the Court noted that intellectually disabled defendants are "less able to give meaningful assistance to their counsel and are typically poor witnesses." *Id.* at 318, 320-21. The final two factors—the ability to lie and whether the capital offense required forethought and complex execution—reflect the Court's desire to draw a line between the "cold calculus" of premeditated murder and the more impulsive nature of the intellectually disabled. *Atkins*, 536 U.S. at 319; *Briseño*, 135 S.W.3d at 8-9.

Citing *Hall*, Moore maintains that courts must follow an established clinical protocol reflecting the most current medical standards when assessing evidence of adaptive functioning, presumably to the exclusion of the non-clinical factors (like those set forth in *Briseño*) that were considered under the "outdated" definition. Pet. 13-23. But arguments like Moore's have been repeatedly rejected by the circuit courts of appeal. *Chester*, 666 F.3d 340, 347-48 ("[O]n their face, nothing about [the *Briseño* factors] contradicts *Atkins*, as they were

developed explicitly to comply with *Atkins*."); *Hooks v. Workman*, 689 F.3d 1148, 1172 (10th Cir. 2012) (reasoning that "the clinical standard is not a constitutional command. The Supreme Court in *Atkins* could have adopted the clinical standard, but explicitly declined to do so."); *Larry v. Branker*, 552 F.3d 356, 369 (4th Cir.) (rejecting an allegation that *Atkins* "requires every state to employ a particular clinical approach to measuring a defendant's adaptive skills."), *cert. denied*, 130 S. Ct. 408 (2009). As the Fifth Circuit has explained:

> No reasonable jurist could theorize that the reasoning animating *Hall* could possibly be extended to *Briseño*. The cutoff at issue in *Hall* was problematic largely because it restricted the evidence—especially regarding adaptive functioning—that could be presented to establish intellectual disability. There is no similar restriction of evidence under *Briseño*. To the contrary, the *Briseño* factors merely provide further guidance to sentencing courts as to *what kinds* of evidence the court might consider when determining adaptive functioning.

Mays, 757 F.3d at 218; *see also Henderson v. Stephens*, 791 F.3d 567, 585-86 (5th Cir. 2015) (finding that *Hall* "does not call into question the constitutionality of the *Briseño* standard.").

Finally, Moore expresses concern that defendants with intellectual disability will be denied the protection of *Atkins* as a result of a court's consideration of non-clinical factors due to the fact that the "outdated"

medical standards are "very difficult (if not impossible) to apply in practice[.]" Pet. 16 (citing *United States v. Wilson*, 922 F. Supp. 2d 334, 340 (E.D. N.Y. 2013)). His concerns are unfounded. Despite his belief that clinicians would have to re-train themselves in the outdated *Briseño* factors every time they testify, Moore overlooks the fact that the *Briseño* factors are "evidentiary factors," not dispositive tests that require training. *Briseño*, 135 S.W.3d at 8. Moore has not identified any case in which a Texas court has determined a single *Briseño* factor to be dispositive.

Instead, multiple individuals in Texas have been determined to be intellectually disabled following the *Briseño* decision. *See, e.g.*, *Ex parte Van Alstyne*, 239 S.W.3d 815, 823-24 (Tex. Crim. App. 2007); *Ex parte DeBlanc*, No. AP-75113, 2005 WL 768441, at *1 (Tex. Crim. App. Mar. 16, 2005); *Ex parte Valdez*, 158 S.W.3d 438, 438 (Tex. Crim. App. 2004); *Ex parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004); *Ex parte Modden*, 147 S.W.3d 293, 299 (Tex. Crim. App. 2004). Thus, the *Briseño* factors permit a finding of intellectual disability and do not "stack[] the deck against intellectually disabled prisoners." Pet. 16.[9]

Because he fails to demonstrate how Texas's standard for evaluating claims of intellectual disability

---

[9] But given that the intellectually disabled comprise less than 3% of the population, it is not unusual that many offenders like Moore who claim intellectual disability are ultimately determined not to warrant that diagnosis. *Atkins*, 536 U.S. at 309 n.5.

contravenes *Atkins* or *Hall*, Moore's request for certiorari should be denied.

III. MOORE'S LENGTHY STAY ON DEATH ROW DOES NOT RENDER HIS SENTENCE UNCONSTITUTIONAL.

Moore next argues that carrying out his death sentence would constitute cruel and unusual punishment because he has been confined to death row since his incarceration in 1980. Pet. 26-34. Relying heavily on the numerous dissenting opinions written by Justice Breyer on the issue, Moore contends that his prolonged confinement on death row subjected him to excessively dehumanizing conditions such that the carrying out of his sentence would no longer serve the dual purposes of the death penalty—retribution and the deterrence of further capital crimes. *Id.* Despite the lack of any supporting case law, he invites the Court to determine "once and for all" whether there are limits to the amount of time a properly convicted defendant can spend on death row before his sentence becomes unconstitutional. The Court should decline the invitation for the same reasons it has repeatedly done so in the past.[10]

---

[10] *See, e.g., Correll v. Florida*, __ S. Ct. __, 2015 WL 6111441 (2015) (denying certiorari on claim of a twenty-nine year delay); *Valle v. Florida*, 132 S. Ct. 1 (2011) (thirty-three year delay); *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (twenty-nine years); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (thirty-two years); *Smith v. Arizona*, 552 U.S. 985 (2007) (thirty years); *Knight v. Florida*, 528 U.S. 990 (1999) (nearly twenty years or more); *Elledge v. Florida*, 525 U.S. 944 (1998) (twenty-three years); *Lackey v. Texas*, 514 U.S. 1045 (1995) (seventeen years).

The question presented to the Court is not a new one. In *Lackey v. Texas*, the petitioner asked the Court to resolve whether his execution after a seventeen-year confinement on death row constituted cruel and unusual punishment under the Eighth Amendment. 514 U.S. 1045 (1995). Acknowledging the importance and novelty of the issue, Justice Stevens issued an invitation to state and lower courts to study the viability of such a claim before it was addressed by the Court. *Id.* (memorandum respecting denial of certiorari). In the twenty-one years since *Lackey*, these courts have resoundingly rejected such claims as meritless.

In the federal courts of appeal, several circuits have outright rejected the idea that a lengthy stay on death row violates a defendant's Eighth Amendment rights. *See, e.g.*, *Reed v. Quarterman*, 504 F.3d 465 (5th Cir. 2007) (rejecting a similar claim based on twenty-four years of death row incarceration); *ShisInday v. Quarterman*, 511 F.3d 514, 526 (5th Cir. 2007) (twenty-five-year stay on death row); *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (fourteen years); *Lackey v. Johnson*, 83 F.3d 116, 117 (5th Cir. 1996) (nineteen years); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (twenty years); *Johns v. Bowersox*, 203 F.3d 538, 547 (8th Cir. 2000) (fifteen years); *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (twenty-five years); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (twenty years); *Richmond v. Lewis*, 948 F.2d 1473, 1492 (9th Cir. 1990) (sixteen years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (fifteen years).

Similarly, numerous state courts have also rejected the claim. *Smith v. State*, 74 S.W.3d 868, 869,

875-76 (Tex. Crim. App. 2002) (thirteen years); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (twenty years); *Moore v. State*, 771 N.E.2d 46, 54-55 (Ind. 2002) (twenty years); *People v. Sims*, 736 N.E.2d 1092, 1040-41 (Ill. 2000) (fifteen years); *State v. Moore*, 591 N.W.2d 86, 93-95 (Neb. 1999) (twenty years); *Hitchcock v. State*, 578 So.2d 685, 693 (Fla. 1990) (twelve years), rev'd on other grounds, 505 U.S. 1215 (1992); *People v. Fry*, 959 P.2d 183, 262 (Cal. 1998) (seven years); *Ex parte Bush*, 695 So.2d 138, 140 (Ala. 1997) (sixteen years); *State v. Schackart*, 947 P.2d 315, 336 (Ari. 1997).

Despite the fact that over two decades have passed since Justice Stevens' invitation to evaluate the claim, Moore has not presented this Court with a single court, state or federal, that has accepted the merits of his Eighth Amendment claim. Some courts have gone even further than simply dismissing the claim and have rejected it in the strongest of terms. *See, e.g., Felder v. Johnson*, 180 F.3d 206, 215 (5th Cir. 1999) (finding that defendant's claim that his twenty-year stay on death row constituted cruel and unusual punishment bordered on the "legally frivolous."); *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (describing a similar claim as a "mockery of our system of justice, and an affront to lawabiding citizens"). Such is the case for good reason—most of the delays are a result of the inmate's own making, having availed himself of the right to direct appeal and to seek collateral relief.

As the Fifth Circuit explained in *White v. Johnson*, 79 F.3d 432, 439-40 (5th Cir. 1996):

> [T]here are compelling justifications for the delay between conviction and the

> execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights. Throughout this process White has had the choice of seeking further review of his conviction and sentence or avoiding further delay of his execution by not petitioning for further review or by moving for expedited consideration of his habeas petition.
>
> Even if much of the delay in this case is the fault of Texas, White cannot now complain of cruel and unusual punishment. White made no effort to inform the Texas courts that their delay was detrimental to him or to ask for expedited review of his petition and we cannot fault them for assuming that White would be grateful for or, at least, indifferent to the delay. White cannot expect Texas courts to know that he wants to get on with his execution without telling them.

79 F.3d at 439.

In concurring with the Court's decision to deny a petition for certiorari on the same issue in *Knight v. Florida*, Justice Thomas further elaborated:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.
>
> It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence . . . *See Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims

> with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed. *See Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring); Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 25 (1995).

528 U.S. at 990.

In sum, Moore appears to seek a permanent bar to his execution because he has successfully taken advantage of the mechanisms that are in place to assure that his conviction and sentence comply with every constitutional standard. But it makes "a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional." *Turner*, 58 F.3d at 933 (Luttig, J., concurring). Ironically, the relief sought by Moore would also "further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution." *Knight*, 528 U.S. at 990 (Thomas, J., concurring). Because he provides no support for such a frivolous allegation, Moore's allegation merits no further review from this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Div.

JEREMY C. GREENWELL
Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Austin, Texas 78711
(512) 936-1400
jeremy.greenwell@texasattorneygeneral.gov

March 18, 2016

AND BRIEF

FILED
APR - 1 2016
OFFICE OF THE CLERK

No. 15-797

IN THE
Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

REPLY BRIEF OF PETITIONER

Luke S. Varley
Alex Blaszczuk
Peter Horn
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Clifford M. Sloan
Counsel of Record
Donald P. Salzman
Lauryn K. Fraas
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Questions Presented Are Properly Before This Court And Warrant Review Without Delay. 3

II. This Court Should Determine Whether The Eighth Amendment Permits A State To Reject Current Medical Standards. 5

III. This Court Should Consider Whether Moore's Extraordinarily Long Confinement Under A Death Sentence Violates The Eighth Amendment 9

CONCLUSION 13

TABLE OF AUTHORITIES

Atkins v. Virginia, 536 U.S. 304 (2002) 1, 6

Ex Parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) 8

Chase v. Mississippi, 171 So. 3d 463 (Miss. 2015) 6

Davis v. Ayala, 135 S. Ct. 2187 (2015) 9, 10

Deck v. Missouri, 544 U.S. 622 (2007) 4

Enmund v. Florida, 458 U.S. 782 (1982) 9

Foster v. Chatman, No. 14-8349 3

Foster v. Florida, 537 U.S. 990 (2002) 9

Glossip v. Gross, 135 S. Ct. 2726 (2015) 10

Hall v. Florida, 134 S. Ct. 1986 (2014) ..... *passim*

Kyles v. Whitley, 498 U.S. 931 (1990) 4

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 3

Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999) 2

Oats v. Florida, 181 So. 3d 457 (Fla. 2015) 5, 7, 8

Oregon v. Agee, 358 Or. 325 (2015) 6, 7, 8

Riegel v. Medtronic, Inc., 551 U.S. 1144 (2007) 11

Sears v. Upton, 561 U.S. 945 (2010) 3

Smith v. Ryan, ---F.3d---, 2016 WL 454337 (9th Cir. Feb. 4, 2016) 8

Wearry v. Cain, 577 U.S. ___ (2016) 3, 4

REPLY BRIEF

The State's opposition confirms the need for this Court to review two pressing questions: (i) whether the Eighth Amendment requires consideration of current medical standards in assessing intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014), and (ii) whether an individual may be executed after an excessively long period of confinement (thirty-five years) under sentence of death, almost half of which has been served—and continues to be served—in solitary confinement.

As the Petition explained, Pet. 12-26, Texas's sweeping rejection of current medical standards for assessing intellectual disability violates this Court's Eighth Amendment jurisprudence. The state habeas trial court determined that Petitioner is intellectually disabled under current medical standards. But the Texas Court of Criminal Appeals ("CCA") held that the lower court "erred" in applying current medical standards, and should instead have applied only Texas's decade-old decision relying on a more-than-two-decades-old superseded medical standard. App. 6a.

Texas's primary argument is that review is unnecessary because States need not follow "any particular methodology"—*including, specifically, current medical standards*—in "assessing claims of intellectual disability." Opp'n 11. This position is far-reaching and deeply wrong. As this Court recently emphasized, a legal determination of intellectual disability must be "informed by the medical community's diagnostic framework," and should not "disregard[] established medical practice." *Hall*, 134 S. Ct. at 1995, 2000. For this reason, every state

high court to consider the issue since *Hall* (in stark conflict with the CCA) has agreed that courts should be guided by current, established medical standards in assessing intellectual disability. The CCA squarely rejected and precluded the use of current medical standards in the Eighth Amendment inquiry mandated by this Court. That crisp legal issue—on which state high courts disagree—urgently warrants this Court's review.

The Court also should review Moore's claim that executing him after prolonged confinement on death row would violate the Eighth Amendment. Texas responds mechanically to Moore's claim, tersely deriding it as "frivolous." But, as Moore explained, Pet. 26-34, significant authority—reflected in the views of three Justices—suggests that executing an inmate after lengthy imprisonment under sentence of death is cruel and unusual. And a fourth Justice has emphasized the harms caused by prolonged periods of solitary confinement. *Id.* at 30. This Petition presents an especially compelling vehicle for this fundamental constitutional issue. Moore has been imprisoned on death row for a longer period (thirty-five years) than in any cited case. And he has spent the last fifteen years deprived of human interaction, alone in his cell 22.5 hours per day. There is an urgent need for this Court to consider whether the dehumanizing conditions of Moore's confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment.[1]

---

[1] Texas's rendition of the facts, Opp'n 3-4, does not undermine the need for review of the legal issues presented; it also conspicuously omits certain facts. *See, e.g., Moore v. Johnson*,

I. The Questions Presented Are Properly Before This Court And Warrant Review Without Delay.

Texas attempts to evade review by suggesting a supposed vehicle problem—that review is unnecessary at this juncture "because Moore has yet to seek federal habeas corpus relief." Opp'n 8. The State's attempt to deflect this Court's consideration is unavailing.

"This Court, of course, has jurisdiction over the final judgments of state postconviction courts, and exercises that jurisdiction in appropriate circumstances." *Wearry v. Cain*, 577 U.S. ___ (2016), slip op. 10-11. There is nothing unusual about this Court exercising jurisdiction to review state collateral proceedings. Already this Term, the Court has reversed state collateral courts twice, *id.* (reversing state habeas court's decision upholding capital conviction); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and has heard argument in another case reviewing such proceedings, *Foster v. Chatman*, No. 14-8349.

This Court has recognized that capital cases present particularly appropriate circumstances for the Court's prompt review: "The alternative to granting review . . . is forcing [petitioner] to endure yet more time on [] death row" due to constitutional error. *Wearry*, slip op. 11; *see also, e.g.*, *Sears v. Upton*, 561 U.S. 945, 956 (2010) (vacating capital sentence upheld in state habeas review and remanding for determination under correct legal standard); *Deck v.*

---

194 F.3d 586, 593 (5th Cir. 1999) (referring to "exculpatory evidence that [Moore's] offense was accidental").

Missouri, 544 U.S. 622, 624 (2007) (reversing state habeas court's decision which had upheld capital sentence). Indeed, that was the precise procedural posture in *Hall v. Florida* itself. 134 S. Ct. at 1992.[2]

The State next contends that review is inappropriate because "the state habeas proceeding generated facts too plentiful to be given full review in the limited context of a petition for writ of certiorari." Opp'n 9. This argument also falls flat. The Questions Presented in this case raise threshold legal issues. The intellectual disability issue presents a fundamental question about the appropriate lens for evaluating the relevant evidence. The CCA applied an egregiously flawed framework for the Eighth Amendment inquiry—that it is forbidden for a court to follow current medical standards. That fundamental legal error, which infects the CCA's entire analysis and its evaluation of the record, merits this Court's consideration.[3] In any event, even "fact-intensive" questions provide no reason for this Court to delay review in the capital context. *Wearry*, slip op. 9-10.

Given the urgent and important questions of law raised in the Petition, there is no reason to "forc[e Moore] to endure yet more time on [Texas's] death

---

[2] Texas's reliance on Justice Stevens's concurrence in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990), Opp'n 8, is misplaced. That opinion predated the Anti-Terrorism and Effective Death Penalty Act, which dramatically changed the scope and tenor of federal habeas review.

[3] For this reason, Texas's suggestion that review is unwarranted because the CCA stated that the trial court misinterpreted the evidence, Opp'n 7, likewise is unavailing: in considering the evidence, the CCA applied the wrong standard and framework based on its threshold legal error.

row in service of" his "constitutionally flawed" sentence. *Id.* at 11. The procedural posture of this case presents no obstacle to this Court's immediate review.

II. This Court Should Determine Whether The Eighth Amendment Permits A State To Reject Current Medical Standards.

The CCA ruled below that the state habeas court "***erred*** by employing the definition of intellectual disability presently used by the [medical community]." App. 6a (emphasis added). Defending the CCA, Texas explicitly maintains that the Eighth Amendment does not "bar[] the execution of a prisoner who is deemed to be intellectually disabled under the most current medical standards." Opp'n 9.

The CCA's repudiation of current medical standards squarely conflicts with every state high court that has considered the issue since *Hall*. In a decision issued two days after this petition was filed, the Florida Supreme Court held that, "[b]ased on further direction . . . in *Hall*, reaffirmed in *Brumfield*, courts must be guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an intellectual disability. . . . [I]n determining the definition of an intellectual disability, the informed assessments of medical experts cannot be disregarded." *Oats v. Florida*, 181 So. 3d 457, 460 (Fla. 2015). Moreover, as explained in the Petition, Pet. 17-18, and in sharp conflict with the CCA, the Oregon and Mississippi Supreme Courts likewise have determined that the Eighth Amendment intellectual disability inquiry requires consideration of current, established medical standards. *See Oregon v.*

Agee, 358 Or. 325, 350, 353-54 (2015) (trial court must apply "now-current medical standards" in assessing intellectual disability); *Chase v. Mississippi*, 171 So. 3d 463, 471 (Miss. 2015) (in light of *Hall* and *Atkins*, recognizing and adopting "new definitions of intellectual disability that are generally accepted in the medical community"). Texas does not even address these decisions cited in the Petition, or explain how their constitutional holdings are consistent with the CCA's across-the-board rejection of current medical standards. It simply ignores them.

The consensus of every state high court to consider the issue since *Hall*—except the CCA here—is amply supported and compelled by this Court's decisions. While the Court undoubtedly "'le[ft] to the States the task of developing ***appropriate ways*** to enforce the constitutional restriction,'" *Atkins*, 536 U.S. at 317 (emphasis added), it did not give the States unfettered discretion. To the contrary, as the Court explained in *Hall*, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." 134 S. Ct. at 1999. As numerous state and federal courts have held, Pet. 18-19, States are not free to reject current, established medical standards and adopt either outdated and superseded medical standards or standards completely untethered to current clinical consensus.[4]

---

[4] Texas attempts to dismiss the Petition as advocating for "tak[ing] the legal decision of whether a defendant is intellectually disabled out of the hands of the factfinder and plac[ing] it in the hands of medical professionals." Opp'n 10. The Petition

Texas also erroneously suggests that it makes no difference that the CCA rejected and flatly forbade the use of current medical standards. The State claims that the CCA's approach, which instead applies decades-old abandoned standards and includes non-clinical factors, is consistent with the current medical diagnostic framework. But the CCA explicitly rejected the trial court's intellectual-disability determination precisely because the trial court relied on current medical standards—a fundamental, threshold issue. And the CCA then determined that Moore was not intellectually disabled under its outdated and non-clinical standards. As Moore's case demonstrates, and as the Petition, the amicus brief of the American Academy of Psychiatry and the Law, and decisions from other courts explicate, the difference between using superseded standards and current medical standards is often outcome-determinative. *See, e.g.*, Pet. 19-26 (explaining the decisive impact of the difference in this case); Amicus Br. of American Academy of Psychiatry & the Law *et al.*, 18-24 (emphasizing the "life-or-death" impact of applying current intellectual disability standards, including in this case); *Agee*, 358 Or. at 353-54 (remanding for consideration of current medical

---

advances no such position. As other state high courts have recognized, courts must make their own legal determinations on intellectual disability, but those decisions must consider the medical community's current medical standards. *See Agee*, 358 Or. at 354 (remanding for new *Atkins* hearing "in which the trial court shall consider the evidence presented in light of the standards set out in the DSM-5 and discussed in *Hall*"); *Oats*, 181 So. 3d at 460 (remanding for intellectual disability determination "guided by established medical practice and psychiatric and professional studies").

standards because difference could be dispositive on life or death).[5]

In sum, Texas's suggestion that it makes no difference whether current medical standards are used is belied by the CCA's linchpin holding that the trial court "erred" in its use of current medical standards; by the record and evidence in this case; by established medical consensus; and by the decisions of other courts.[6]

---

[5] Instead of responding to the explanations in the Petition and the American Academy of Psychiatry amicus brief of the life-or-death consequences regarding the failure to apply current medical standards in this case, Texas defends the CCA's use of its "*Briseno* factors" to assess adaptive deficits. Opp'n 15-19 (citing *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)). As noted in the Petition, Pet. 25 n.9, use of those outdated and non-clinical factors has been heavily criticized. *See also Smith v. Ryan*, ---F.3d---, 2016 WL 454337, at *12 n.18 (9th Cir. Feb. 4, 2016) ("a national consensus" of states now forbids the use of a non-clinical definition of adaptive deficits).

[6] Texas's contention that "*Hall* 'exclusively addresses the constitutionality of mandatory, strict IQ test cutoffs,'" Opp'n 14, conflicts with other courts. *See, e.g.*, *Oats*, 181 So. 3d at 470-71; *Agee*, 358 Or. at 354; *Smith*, ---F.3d---, 2016 WL 454337, at *12 n.18 ("the Supreme Court held in *Hall* that states must comply with elements of the clinical definition [of intellectual disability] about which there exists a national consensus"; noting that Arizona's "restrictive" and non-clinical definition of adaptive deficits "may well be violative of the rules established in *Hall*, and unconstitutional").

III. This Court Should Consider Whether Moore's Extraordinarily Long Confinement Under A Death Sentence Violates The Eighth Amendment.

The State does not meaningfully challenge the merits of Moore's Eighth Amendment claim based on his prolonged confinement under sentence of death. It does not dispute that Moore has been confined under threat of death for over thirty-five years—a longer period than in any other cited claim. Pet. 8. It does not dispute that, for nearly half that time, Moore has been held in highly isolated "administrative segregation," *id.* at 8-9 & 9 n.4—a "regime that will bring you to the edge of madness, perhaps to madness itself," *Davis v. Ayala*, 135 S. Ct. 2187, 2209-10 (2015) (Kennedy, J., concurring). Or that the State's setting of two execution dates for Moore, Pet. 8, has only "sharpened" "[d]eath row's inevitable anxieties and uncertainties," *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Breyer, J., dissenting from denial of certiorari). Nor does Texas contest that views at the Founding, and this Court's precedent, support Moore's claim that execution after such prolonged confinement is cruel and unusual. Pet. 28-29.

Texas also does not dispute that executing a person after such lengthy confinement furthers none of the "social purposes" served by the death penalty and therefore is "nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *See Enmund v. Florida*, 458 U.S. 782, 798 (1982); Pet. 31-33. Finally, Texas has no answer to the fact that the United States stands as an obvious outlier amid the "[c]lear consensus" of international authorities that execution after prolonged death-row detention is cruel and un-

usual. *See* Amicus Br. of Int'l Law & Human Rights Societies, Practitioners & Scholars [hereafter "Int'l Law Br."] 2, 14-24.

Instead, Texas points only to three perfunctory arguments in opposition to the urgent need for this Court to clarify whether the Eighth Amendment permits execution of a person who has languished on death row, in highly isolated confinement, for three-and-a-half decades. None has merit.

First, Texas criticizes Moore for "[r]elying heavily on the numerous dissenting opinions written by Justice Breyer on the issue." Opp'n 20. But this gives short shrift to the weighty underpinnings of Moore's argument. As a threshold matter, Moore relies on the consistent urgings of two Justices (Justices Breyer and Stevens) to review the issue, Pet. 27 n.10, and the recent reservations expressed by a third Justice (Justice Ginsburg) about the execution of persons after a long period of confinement, *id.* (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting)). Moore also highlights the profound concerns of a fourth Justice (Justice Kennedy) about prolonged periods of solitary confinement. Pet. 30 (discussing *Davis*, 135 S. Ct. at 2209-10 (Kennedy, J., concurring)). Surely the views of at least four Justices cannot be dismissed as "frivolous." Opp'n 25. Moore also supports his claim with case law from this Court; views at the Founding; the English Declaration of Rights of 1689; international law; and an analysis of penological justification. Pet. 28-33.

Second, citing the denial of certiorari in previous cases, Texas maintains that "[t]he Court should decline the invitation for the same reasons it has

repeatedly done so in the past." Opp'n 20 & n.10. Of course, this Court's denial of petitions presenting even identical issues says nothing of the merits of this Petition. Indeed, this Court recently granted certiorari in *Riegel v. Medtronic, Inc.*, 551 U.S. 1144 (2007), even though it had denied petitions raising identical issues five times in the previous six years. *See Riegel*, Opp'n Br., 2006 WL 2849233, at *1. The urgent need to review this issue has heightened in recent years, in light of the increase in the average period of an inmate's confinement before execution, Pet. 27, and the burgeoning international consensus that execution of a person after such prolonged confinement is cruel and unusual, Int'l Law Br. 2, 14-24.

Most fundamentally, review is warranted given the compelling nature of Moore's claim. Moore presents a constellation of factors not found in any case cited by Texas that strongly favor this Court's consideration: he has been confined under sentence of death for a longer period than in any cited case; he currently is held in highly isolated confinement, where he has remained for nearly the last fifteen years; he has endured the signing of two separate death warrants during his confinement on death row; and for virtually all of his thirty-five years on death row, he has been fighting to vindicate his constitutional rights, prevailing in one proceeding and winning in the state habeas trial court in another.

Third, Texas contends that Moore's prolonged confinement is a "result of the inmate's own making, having availed himself of the right to direct appeal and to seek collateral relief." Opp'n 22. Not so. Almost the entirety of Moore's confinement (at least thirty-two of the thirty-five years) has been spent raising—and largely vindicating—constitutional

claims to ensure that his conviction and sentence comport with this Court's precedent. Pet. 33-34. Moore's persistent and meritorious enforcement of his constitutional rights should weigh *against the state that deprived him of his rights*, not against the victim of the constitutional violations.

Texas, at bottom, contends that Moore's Petition presents a "frivolous" argument that "makes 'a mockery of our system of justice.'" Opp'n 25 (citation omitted). The Court should grant review and make clear that the real "mockery of our system of justice" is the State's decision to force Moore to languish in prison, in highly isolated confinement, with the specter of death ever present.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Luke S. Varley
Alex Blaszczuk
Peter Horn
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Clifford M. Sloan
Counsel of Record
Donald P. Salzman
Lauryn K. Fraas
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

April 1, 2016

Supreme Court, U.S.
FILED
JAN 19 2016
OFFICE OF THE CLERK

No. 15-797

IN THE
Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

BRIEF FOR *AMICI CURIAE* THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, THE CONSTITUTION PROJECT, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER

VIRGINIA E. SLOAN
SARAH TUBERVILLE
THE CONSTITUTION PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, DC 20036

January 19, 2016

MEIR FEDER
Counsel of Record
IAN SAMUEL
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3755
mfeder@jonesday.com

Counsel for Amici Curiae

(Additional Counsel Listed on Inside Cover)

PATRICK MULVANEY
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar St., N.W.
Atlanta, GA 30303

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY HAVE EVOLVED SUBSTANTIALLY OVER TIME 5

A. Pre-*Atkins* Criteria for Diagnosis of Intellectual Disability 7

B. The Diagnostic Criteria in Effect at the Time of *Atkins* 11

C. The Modern Standards in the DSM-5, As Applied in *Hall* 13

II. MODERN CLINICAL STANDARDS WILL MAKE A LIFE-OR-DEATH DIFFERENCE FOR MANY PRISONERS 17

A. Bobby James Moore 18

B. Isaac Creed Agee 19

C. Stephen Anthony Butler 21

D. Paul Hardy and Victor Wayne Hooks 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. State,
163 S.W. 3d 333 (Ark. 2004) 13

Atkins v. Virginia,
536 U.S. 304 (2002) 11, 12

Brown v. Plata,
563 U.S. 493 (2011) 1

Butler v. Quarterman,
576 F. Supp. 2d 805 (S.D. Tex. 2008) 21, 22

Clark v. Arizona,
548 U.S. 735 (2006) 1

Engram v. State,
200 S.W. 3d 367 (Ark. 2004) 13

Ex parte Cathey,
451 S.W. 3d 1 (Tex. Crim. App. 2014) 24

Ex parte Perkins,
851 So. 2d 453 (Ala. 2002) 13

Hall v. Florida,
134 S. Ct. 1986 (2014) ..... *passim*

Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 23, 24

Indiana v. Edwards,
554 U.S. 164 (2008) 1

Lockett v. Ohio,
438 U.S. 586 (1978) 5

Murphy v. State,
54 P.3d 556 (Okla. Crim. App. 2002) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Penry v. Johnson,
532 U.S. 782 (2001) 1

State v. Agee,
358 Or. 325 (2015) (en banc) 20, 21

United States v. Hardy,
762 F. Supp. 2d 849 (E.D. La. 2010) 23

STATUTES

Rosa's Law, Pub. L. No. 111-256, 124
Stat. 2643 (2010) 3

OTHER AUTHORITIES

ABA Report, EVALUATING FAIRNESS AND
ACCURACY IN STATE DEATH PENALTY
SYSTEMS (2013) 16

American Association on Intellectual &
Developmental Disabilities,
INTELLECTUAL DISABILITY:
DEFINITION, CLASSIFICATION, AND
SYSTEMS OF SUPPORTS (11th ed. 2010) 4, 8, 10, 11

American Psychiatric Association, DI-
AGNOSTIC AND STATISTICAL MANUAL OF
MENTAL DISORDERS (4th ed. 2000) 11, 13, 23

American Psychiatric Association,
DIAGNOSTIC AND STATISTICAL MANUAL
OF MENTAL DISORDERS (5th ed. 2013) .....*passim*

American Psychiatric Association, DSM-
5 INTELLECTUAL DISABILITY FACT
SHEET (2013), available at
http://goo.gl/Sus8VO 17, 18

TABLE OF AUTHORITIES
(continued)

Page(s)

4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765) 5

The Constitution Project, IRREVERSIBLE ERROR (2014) 2

James R. Flynn, WHAT IS INTELLIGENCE?: BEYOND THE FLYNN EFFECT (2007) 16

Stephen Greenspan & Harvey N. Switzky, *Forty-four Years of AAMR Manuals*, in WHAT IS MENTAL RETARDATION?: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY (Harvey N. Switzky ed., 2006) 8, 9, 10

Frank M. Gresham & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, 49 Intellectual & Developmental Disabilities 131 (2011) 16

Haydt, Greenspan & Argharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in* Atkins *(Death Penalty) Cases*, 82 U.K.M.C. L. Rev. 359 (2014) ..... *passim*

THE OXFORD COMPANION TO THE MIND (O.L. Zangwill & Richard L. Gregory eds., 1987) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

William Stern, THE PSYCHOLOGICAL METHODS OF TESTING INTELLIGENCE (1914) 7

Sup. Ct. R. 10 3

Sup. Ct. R. 37.2(a) 1

Geraldine W. Young, Note, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 Vand. L. Rev. 615 (2012) 16

INTEREST OF *AMICI CURIAE*[1]

The American Academy of Psychiatry and the Law (AAPL), with approximately 1,500 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as an *amicus curiae* in, among other cases, *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Brown v. Plata*, 563 U.S. 493 (2011); *Indiana v. Edwards*, 554 U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnson*, 532 U.S. 782 (2001). AAPL's member physicians work to ensure accurate evaluation, humane care, and effective treatment for all persons with mental disorders, including intellectual disabilities. AAPL's members engage in treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system.

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. Beginning in May 2001, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others, to examine issues related to the

---

[1] Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intent to file this brief. Counsel of record for all parties consented in writing to its filing.

No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel made a monetary contribution to the preparation or submission of this brief.

administration of the death penalty. The committee's most recent report makes 39 recommendations that the committee believes are essential to reducing the risk of wrongful capital convictions and executions, including safeguarding the Eighth Amendment's prohibition against the execution of individuals with intellectual disability. See The Constitution Project, IRREVERSIBLE ERROR (2014).

The Southern Center for Human Rights (SCHR) is a nonprofit law office based in Atlanta, Georgia. For the past 40 years, SCHR has represented people facing the death penalty in the southern United States. In the 1980s, SCHR's advocacy contributed to Georgia becoming the first state in the nation to prohibit the practice of executing people with intellectual disability. This Court later held in *Atkins* that the practice violates the Eighth Amendment. SCHR is concerned that despite those developments, intellectually disabled people still are being sentenced to death and executed throughout the nation, in part because courts are relying on outdated understandings of intellectual disability.

SUMMARY OF ARGUMENT

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), this Court invalidated Florida's *Atkins* procedures because they did not comply with modern diagnostic standards for intellectual disability.[2] Because society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue," in "determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Id.* at 1993. Yet, as the petition correctly argues, the decision below creates a clear split in authority regarding whether a court may require the use of outdated diagnostic criteria when assessing *Atkins* claims, as Texas does. The answer to that question, which follows *a fortiori* from *Hall*, is equally clear: No.

Amici will not repeat those arguments here. Instead, the purpose of this filing is to explain why the resolution of that issue is of exceptional importance, such that this Court's review would be especially worthwhile. See Sup. Ct. R. 10. In short, the consensus diagnostic criteria for intellectual disability have changed in important ways over time, such that a refusal to consider up-to-date criteria will necessarily

---

[2] In this brief, *amici* use the term "intellectual disability" to describe the phenomenon that *Atkins* referred to as "mental retardation," in keeping with the modern practice. See Rosa's Law, Pub. L. No. 111-256 § 2, 124 Stat. 2643 (2010) (changing entries in the U.S. Code from "mental retardation" to "intellectual disability"); *Hall*, 134 S. Ct., at 1990 ("This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts").

result in the execution of defendants who are plainly intellectually disabled under consensus standards. In the early 20th century, intellectual disability was generally diagnosed almost entirely through mechanical application of IQ tests. Since then, there has been a steady trend in the diagnostic criteria to (1) emphasize individualized clinical assessment of both intellectual ability and what is known as "adaptive functioning," and (2) deemphasize reliance on IQ scores, especially scores that are not corrected for factors like standard error in measurement and test norm obsolescence (which can causes older test scores to appear artificially higher).

That modern trend has culminated in the publication of the latest clinical definitions of intellectual disability. See American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) (hereinafter "DSM-5"); American Association on Intellectual & Developmental Disabilities, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) (hereinafter, "AAIDD Manual").[3] These clinical definitions—which this Court applied in *Hall* to invalidate Florida's scheme—require significant limitations in intellectual and adaptive functioning, as assessed by individualized clinical evaluation, as well as onset during the developmental period. See DSM-5 33; AAIDD Manual 27. While intelligence testing remains one tool to aid a clinician's assessment of intellectual functioning, IQ ranges are no longer part of

[3] Although there are certain technical differences in the APA and AAIDD clinical definitions, they are not implicated by the question presented.

the DSM-5 definition of intellectual disability. Moreover, standard error measurements and test norm obsolescence must be taken into account, and the severity of the disability is now defined by reference to adaptive functioning, rather than IQ scores.

The use of these modern standards will be a question of life or death in many cases—because there will be a number of individuals who might *not* meet the criteria for intellectual disability as expressed in certain now-outdated standards, but who *do* satisfy the accepted modern criteria. Because the answer to the question presented will be outcome-determinative in many death penalty cases, where the punishment "is qualitatively different from any other sentence," this Court's resolution of the split in authority identified by the petition is especially justified. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

ARGUMENT

I. DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY HAVE EVOLVED SUBSTANTIALLY OVER TIME

Anglo-American law has long recognized a relationship between intellectual capacity and criminal responsibility—and has, for just as long, recognized that our understanding of that relationship is constantly evolving. Blackstone observed that "ancient Saxon law" had provided that a child under twelve could not be "guilty in will" of a capital crime—but noted that under the law "as it now stands, and has stood at least ever since the time of Edward the third," the "capacity of doing ill ... is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." 4 W. Black-

stone, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1765). Blackstone's conception of intellectual disability (which was essentially restricted to those he deemed "idiots") was, thankfully, not the terminus of our society's understanding—though even then, it was coming to be understood that the question of intellectual capacity could not be answered by simplistic numerical lines alone.

Just as it would have been wrong to freeze the Saxon practice in place as our law's unyielding yardstick of intellectual disability, there is no justification for allowing States to apply outdated clinical standards (insofar as they conflict with current ones). If States are not required to use the current diagnostic standards, then there is no particular reason that they may not use *any* obsolete standard, such as the discarded standards of the DSM-III (from 1980) or the DSM-II (from 1968)—or, for that matter, Blackstone's standards.

Surveying the history of change in the criteria for diagnosis of intellectual disability illustrates why it is exceptionally important that modern standards be required. The history of diagnosing intellectual disability is a history of refinements and improvements to produce more accurate and reliable diagnoses. And those changes tell a consistent story: toward individualized clinical evaluation of intelligence, toward emphasis on adaptive functioning, and away from mechanical reliance on IQ scores—especially scores uncorrected for standard measurement error and norm obsolescence. "To enforce the Constitution's protection of human dignity, this Court looks to the evolving standards of decency that mark the progress of a maturing society." *Hall*, 134 S. Ct., at 1992 (quoting

Trop v. Dulles, 356 U.S. 86, 101 (1958)). Modern standards for intellectual disability are part of that "progress of a maturing society"—and the Eighth Amendment requires States to use them.

A. Pre-*Atkins* Criteria for Diagnosis of Intellectual Disability

In the 20th century, the advent of universal public education also created a need to identify children who were likely to need special assistance in school, leading two French educational psychologists to develop an early intelligence test for this purpose—the Binet-Simon Intelligence Scale. See THE OXFORD COMPANION TO THE MIND 88 (O.L. Zangwill & Richard L. Gregory eds., 1987). In an effort to simplify the results of the Binet-Simon test, German psychologist William Stern created the now well-known "intelligence quotient"—IQ—which was designed to express a ratio between the child's ability and the norm for the child's age, multiplied by 100 for ease of reading. See generally William Stern, THE PSYCHOLOGICAL METHODS OF TESTING INTELLIGENCE (1914) (Guy Montrose Whipple, trans.).

The IQ test proved popular, not least because its simple numerical output proved easy to use in bureaucracies. And in the United States, the Binet-Simon test was translated and imported by eugenicists who immediately advocated for its use in (for example) "placing people with mild [intellectual disability] into gender-segregated large institutions" and "adoption of enforced sterilization laws." Haydt, Greenspan & Argharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in* Atkins *(Death Penalty) Cases*, 82

U.M.K.C. L. Rev. 359, 363 (2014). At this early stage, intellectual disability was often "defined and diagnosed entirely based on IQ scores." *Ibid.*

But "dissatisfaction with the IQ score as the sole indicator of [intellectual disability] emerged over time." AAIDD Manual 43. And there were also "concerns about racial and socioeconomic discrimination," including worries that "excessive numbers of poor minority children" were being "wrongly assigned the [intellectual disability] label and placed in self-contained classes." Haydt, Greenspan & Argharkar, *supra*, at 363. Professionals came to realize that IQ tests "only provided a narrow measure of intellectual functioning related to academic tasks ... thus ignoring important aspects of intellectual functioning that included social and practical skills." AAIDD Manual 43–44.

Partly in response to these concerns, in 1961, the AAIDD published a diagnostic manual for intellectual disability that sought to deemphasize exclusive reliance on IQ.[4] See Stephen Greenspan & Harvey N. Switzky, *Forty-four Years of AAMR Manuals*, in WHAT IS MENTAL RETARDATION?: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 3-28 (Harvey N. Switzky ed., 2006). The 1961 AAIDD manual began with a *conceptual* definition of intellectual disability as "subaverage general intellectual functioning which originates during the developmental period and is as-

[4] The AAIDD was formerly known as the American Association on Mental Deficiency (AAMD) and later the American Association on Mental Retardation (AAMR). For the sake of consistency, it is referred to throughout this brief as the AAIDD wherever possible.

sociated with impairment in adaptive behavior." *Id.* at 5. The major components of that conceptual definition have remained, in more or less that form, ever since.

But the conceptual definition begat certain crucial implementation questions. First, how is "subaverage general intellectual functioning" assessed? Second, what is the meaning and relative importance of "impairment in adaptive behavior?" As to the first, the 1961 manual defined "subaverage" as performance on a "measure[] of general intellectual functioning"—an IQ test—that is "greater than one Standard Deviation below the population mean of the age group involved." *Ibid.* (That would mean an IQ score of 84 or less. *Ibid.*) As to the latter, the manual defined "adaptive functioning" (somewhat vaguely) as the "effectiveness of the individual in adapting to the natural and social demands of his environment," as reflected in "limitations" in "maturation," "learning," or "social adjustment for different age groups." *Id.* at 5–6.

The aim of the 1961 AAIDD manual was that approximately seventeen percent of the population would fall below the IQ threshold, and the adaptive-behavior prong of the test would further narrow the population to a prevalence of around "three percent"—the conventional wisdom being that intellectual disability "was an appropriate diagnosis for the least intelligent three percent of the population." Haydt, Greenspan & Argharkar, *supra*, at 364. Unfortunately, in practice, "practitioners and agencies" essentially "ignored" the adaptive-behavior prong and continued to focus exclusively on IQ. *Ibid.*; see also Greenspan & Switzky, *supra*, at 8 (chief "perceived

problem[]" with the 1961 manual was "its creation of a Borderline category with an IQ ceiling of 85," which was "exacerbated by diagnosticians' widespread ignoring of the Adaptive Behavior criterion").

In an attempt to solve that problem, the AAIDD's 1973 manual—while essentially leaving in place the conceptual definition of intellectual disability—made certain operational changes. The required IQ score was changed from "minus one standard deviation ... to minus two standard deviations" (a score of 70 on the standard scale). Greenspan & Switzky, *supra*, at 9. In the hope that this would prompt more clinical attention on adaptive deficits, the 1973 manual also elaborated further on the definition of "adaptive behavior," explaining that it was defined by an individual's ability to "meet[] the standards of personal independence and social responsibility expected of his age and cultural group," and gave various examples. *Id.* at 9. When the American Psychiatric Association released the Third Edition of its Diagnostic and Statistical Manual (the "DSM-III") in 1980, it largely tracked this 1973 AAIDD manual—replacing a definition in the DSM-II that was widely regarded as inappropriate. See Haydt, Greenspan & Argharkar, *supra*, at 363 (DSM-III "followed the lead pretty closely of the most recent AAIDD manual").

Both the DSM and the AAIDD manuals also came to grapple with a basic statistical problem in how some diagnosticians were using IQ scores: the concept of standard measurement error (or SEM). SEM represents the variation around the "true score"—one that would be obtained if the test were perfectly reliable—and yields a statistical confidence interval (typically ±5 points). See AAIDD Manual 36. The

general concept is equivalent to the margin of error in a poll, such that a full scale IQ "score of 70 is most accurately understood not as a precise score but as a range of confidence," with a 95% confidence that the true answer lies within 2 SEM of the individual's score. AAIDD Manual 224. Clinical judgment must therefore be brought to bear on an IQ score along with other indicia of intellectual functioning in order to create an appropriate diagnosis.

B. The Diagnostic Criteria in Effect at the Time of *Atkins*

In 2002, this Court decided *Atkins v. Virginia*, which held for the first time that the execution of an intellectually disabled prisoner was unconstitutional. 536 U.S. 304 (2002). The Court's opinion invoked the AAIDD's (then still the AAMR) 1992 manual as well as the "similar" definition in the revised fourth edition of the DSM, the DSM-IV-TR.[5] *Id.* at 308 n.3 (quoting American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed. 2000) (herein "DSM-IV-TR")). Those standards tracked the conceptual definition that had been largely stable since the 1961 AAIDD manual: a diagnosis required "significantly subaverage intellectual functioning," accompanied by "limitations" in adaptive functioning in various further-enumerated skill areas (such as "communication," "self-care," and "functional academic skills"), with onset in the devel-

[5] The DSM-IV was released in 1994; the DSM-IV-TR, in 2000, was a technical revision that left the diagnostic categories and the vast majority of the specific criteria for diagnosis unchanged.

opmental period. *Ibid.* Under then-prevailing norms, this typically meant "an IQ level of 50–55 to approximately 70." *Ibid.*

The *Atkins* Court acknowledged that there might be "serious disagreement" about "which offenders are in fact [intellectually disabled]." *Id.* at 317. "Not all people who claim to be" will in fact "be so impaired as to fall within the range of ... offenders about whom there is a national consensus," this Court reasoned. *Ibid.* But while noting that the task "of developing appropriate ways to enforce the constitutional restriction" would be left "to the States," this Court nonetheless observed that States' various "statutory definitions ... generally conform to the clinical definitions" reviewed earlier in the opinion. *Ibid.* & n.22 (quoting *Ford v. Wainwright*, 477 U.S. 399 (1986)).

Following the Court's decision in *Atkins*, courts across the country were required (in many cases for the first time) to determine whether a prisoner was intellectually disabled and thus ineligible for execution. In so doing, the "most cited technical reference in *Atkins* cases" quickly became the then-current DSM-IV-TR. Haydt, Greenspan & Argharkar, *supra*, at 368. The Court's citation of the DSM-IV-TR (along with the related AAIDD manual) certainly made this a reasonable choice—and there is no indication that anyone thought that older versions of the APA's manuals should be used, such as the DSM-II or the DSM-III.

Unfortunately, courts almost immediately seized upon the DSM-IV-TR's definition of a person with "significantly subaverage general intellectual functioning" as being defined "by the [IQ] obtained by as-

sessment with one or more" standardized intelligence tests, resulting in "an IQ of about 70 or below." DSM-IV-TR 39. The result was "an evidentiary free-for-all" as courts and counsel "were overwhelmed by basic statistical concepts of error of measurement, test norming, test validity and reliability." Haydt, Greenspan & Argharkar, *supra*, at 369. Assessments of "adaptive functioning" were in many cases "thrown by the wayside," because the DSM-IV-TR "had no ... standardized measurements of adaptive functioning," such that the "connection between adaptive functioning and intellectual functioning was lost in the shadow of IQ." *Ibid.*

In *Ex parte Perkins*, for example, the first Alabama case in the wake of *Atkins*, the Alabama Supreme Court relied on the DSM-IV as being the "most common definitions" of intellectual disability. 851 So. 2d 453, 457 (Ala. 2002). The Alabama Court denied relief, stating that the defendant "has a full-score IQ of 76," and thus did not have "significantly subaverage intellectual functioning (an IQ of 70 or below)." *Ibid.* The Alabama court did not engage in any meaningful discussion of "adaptive function or age of onset." Haydt, Greenspan & Argharkar, *supra*, at 379. Nor did the *Perkins* court engage meaningfully with SEM. See also *Engram v. State*, 200 S.W. 3d 367 (Ark. 2004); *Anderson v. State*, 163 S.W. 3d 333 (Ark. 2004); *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002) (relying on the DSM-IV-TR and committing similar errors).

C. The Modern Standards in the DSM-5, As Applied in *Hall*

The fifth edition of the DSM, published in 2014, was the result of a "massive undertaking that involved hundreds of people working toward a common goal over a 12-year process." DSM-5 5. And the DSM-5 emerged (along with the essentially contemporaneous AAIDD Manual) at a time of widespread confusion among the courts on how to apply the *Atkins* standard. The new standards made certain crucial changes in the diagnosis of intellectual disability, designed to correct excessive reliance on raw IQ at the expense of nuanced intelligence assessment and clinical analysis of adaptive functioning. In that respect, the DSM-5 represents the "culmination of efforts to reduce reliance on IQ." Haydt, Greenspan & Argharkar, *supra*, at 365. One intent of the revisions was to ensure that individuals with developmental brain-based disorders could be diagnosed appropriately as intellectually disabled, even when an individual's IQ scores fall "above artificially-set IQ ceiling scores." *Id.* at 366.

The DSM-5's conceptual definition of intellectual disability is not radically changed. It is described as having "three criteria" that must be met: (1) deficits "in intellectual functions" (such as "reasoning" or "problem solving"), which are "confirmed by *both* clinical assessment *and* individualized, standardized intelligence testing"; (2) deficits in "adaptive functioning," such that an individual has limited functioning "in one or more activities of daily life, such as communication, social participation, and independent living"; and (3) onset of these deficits "during the developmental period." DSM-5 33 (emphasis added). On its

own, that bears a reasonably high similarity to the conceptual definition that had been in use since 1961.[6]

But while there is thus "overlap" between the DSM-5 definition of intellectual disability and previous definitions, there are also "significant differences" in how the idea is operationalized. Haydt, Greenspan & Argharkar, *supra*, at 379. First, and most crucially, the DSM-5 expressly states that diagnosis of intellectual disability should be "based on *both* clinical assessment *and* standardized testing of intellectual *and adaptive* functions"—such that exclusive reliance on IQ tests (which are not, standing alone, "clinical assessments," and which do not purport to measure adaptive function) is inappropriate. DSM-5 37 (emphasis added).

Moreover, the DSM-5 is the first diagnostic manual to classify the severity in intellectual disability according to assessments of adaptive functioning rather than an IQ score. DSM-5 33–36. That is because "it is adaptive functioning," "not IQ scores," that "deter-

---

[6] But, as four members of this Court have observed, even this conceptual definition represents significant evolution between the DSM-IV-TR and DSM-5. In his *Hall* dissent, Justice Alito (joined by three other members of the Court) observed (without contradiction) that the DSM-5 "fundamentally alters the first prong of the longstanding, two-pronged definition of intellectual disability" by discarding "'significantly subaverage intellectual functioning' as an element of the intellectual-disability test." 134 S. Ct., at 2006 (Alito, J., dissenting). And that is true: the DSM-5 now requires only "deficits in intellectual functions" that are "confirmed by both clinical assessment and individualized, standardized intelligence testing." DSM-5 33.

mines the levels of supports required"—such that deficits in adaptive functioning have far greater practical significance. *Id.* at 33. The DSM-5 recognizes that IQ scores "are approximations of conceptual functioning," but may be "insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM-5 37. A person with "an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Ibid.*

The DSM-5 also officially recognized, for the first time, the phenomenon of test norm obsolescence—"overly high scores due to out-of-date test norms." DSM-5 37. Because an IQ test is a normed test, and population norms change over time (for various reasons), if aging test norms are not taken into account, it is well-established that "average scores on an IQ test" will appear to "artificially increase over time."[7] ABA Report, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS 392 (2013). That is, the *very same* person taking a given IQ test will score lower than he would if he took a test that was normed further in the past. Thus, a statistical adjustment is required "as time passes from the specific point in time when the publisher standardized the

---

[7] This is sometimes known as the "Flynn effect." See generally James R. Flynn, WHAT IS INTELLIGENCE?: BEYOND THE FLYNN EFFECT (2007); Frank M. Gresham & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, 49 Intellectual & Developmental Disabilities 131, 134–37 (2011).

test." Geraldine W. Young, Note, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 Vand. L. Rev. 615, 617 (2012).

In *Hall*, this Court applied the DSM-5 standards to invalidate Florida's procedures for addressing *Atkins* claims. This Court reasoned that society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue," such that in "determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct., at 1993. The Court concluded that the Florida rule at issue "disregards established medical practice" in two ways: by taking "an IQ score as final and conclusive evidence of a defendant's intellectual capacity," when the DSM-5 directs consideration of "other evidence," and (relatedly) by relying "on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 1995 (discussing measurement error).

In sum, as a fact sheet published in advance of the DSM-5 put it, the new standard "emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone." American Psychiatric Association, DSM-5 INTELLECTUAL DISABILITY FACT SHEET (2013), available at http://goo.gl/Sus8VO. By "removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overemphasized as the

defining factor of a person's overall ability, without adequately considering functioning levels." *Ibid.*

II. MODERN CLINICAL STANDARDS WILL MAKE A LIFE-OR-DEATH DIFFERENCE FOR MANY PRISONERS

As demonstrated above, the criteria for intellectual disability have evolved significantly, to progressively (1) reduce mechanical emphasis on IQ scores, (2) take account of SEM and test-norm obsolescence when such scores *are* used, and (3) increase primary reliance on individualized clinical assessment of intellectual and adaptive deficits. These changes in criteria are of incredible practical importance, and will make a life-or-death difference in a significant number of cases—changing the outcome such that a prisoner who could be executed under the old standards could not be under the new.

A few examples are given below.

A. Bobby James Moore

The decision in this very case is an instance of modern standards being outcome-determinative. The trial judge, following a two-day evidentiary hearing, concluded that Moore was intellectually disabled under the criteria in the DSM-5 and the most current AAIDD manual. Pet. App. 4a. The trial court reached this conclusion in part based on its application of SEM and norm obsolescence to Moore's IQ scores, in line with the AAIDD manual "best practice[s]." Pet. App. 157a. In doing so, the trial court noted that it "join[ed] with the inventors of IQ tests ... in recognizing that IQ tests are not designed to—nor are they able to—produce a single and precise figure." Pet.

App. 155a. Under modern standards, all of this was correct.

But the Texas Court of Criminal Appeals concluded that the judge had "erred by ... employing the definition of intellectual disability presently used" by the leading mental-health organizations. Pet. App. 6a. While acknowledging that "the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed," the Texas Court of Criminal Appeals nonetheless concluded that modern diagnostic criteria "do not determine whether an individual is exempt from execution under *Atkins*." Pet. App. 6a–7a.

The court then went on to rely essentially exclusively on IQ scoring while rejecting adjustments to those scores based on test-norm obsolescence. Pet. App. 7a–8a, 63a–75a. The court, relying mechanically on IQ scores, concluded that Moore "failed to prove ... that he has significantly sub-average general intellectual functioning" based on his IQ score of 78 obtained in 1973, and an IQ score of 74 obtained in 1989. Pet. App. 63a. At trial, Moore had presented evidence from his medical expert that the 78 IQ score should be adjusted to 70 to account for norm obsolescence, and that his score of 74 should be adjusted to 71 for the same reason. Pet. App. 65a. Nonetheless, based on its recent holding that the "test score ... may not be changed" to account for test-norm obsolescence, the court denied relief. Pet. App. 73a-75a.

Under modern diagnostic criteria, this sort of exclusive emphasis on raw IQ scores would be improper, as would the failure to adjust the raw IQ scores in ways now recognized as clinically required. It is un-

surprising, therefore, that the trial court in this case (which used modern diagnostic criteria) granted relief, and the court below did not.

B. Isaac Creed Agee

Another particularly vivid example of the difference that modern clinical standards can make is the case of Isaac Creed Agee. See *State v. Agee*, 358 Or. 325 (2015) (en banc) (slip op.). At his 2011 murder trial, Agee argued that he was intellectually disabled and therefore ineligible for the death penalty. *Id.* at 2. The trial court found that Agee "suffered from partial fetal alcohol syndrome," but that he "had not established an intellectual disability that would make him constitutionally ineligible for the death penalty." *Ibid.*

In so doing, the trial court evaluated "the severity" of Agee's intellectual disability "by [his] IQ score." *Id.* at 9. Agee had relatively high IQ scores, and so while the trial court did not apply a "rigid cutoff," it did conclude that his scores overall were "too high to permit a finding ... of 'significantly subaverage intellectual functioning,'" as then-current diagnostic criteria required. *Id.* at 12. The Oregon Supreme Court concluded that this "ruling was not erroneous at the time it was made." *Ibid.*

Nonetheless, the *Agee* court reversed, accepting the defendant's argument that the modern standards as reflected in the DSM-5—which departed "from a rigid reliance on IQ test scores"—required a "new evidentiary hearing in light of current scientific knowledge, so that the trial court can make a determination of intellectual disability under a proper understanding of prevailing medical practice." *Id.* at 13. The court observed that the DSM-5 "deletes reference

to particular IQ scores, emphasizing instead that clinical assessment and standardized test results confirm a person's deficits in intellectual functions." *Id.* at 14. And it quoted with approval Justice Alito's statement that the DSM-5 "fundamentally alters the first prong of the longstanding, two-pronged definition of intellectual disability," and "discards 'significantly subaverage intellectual functioning' as an element of the intellectual-disability test." *Id.* at 14 (quoting *Hall*, 134 S. Ct., at 2006 (Alito, J., dissenting)).

Thus, although accepting that the trial court's assessment may have "comported with the published standards existing at the time that the court ruled," the *Agee* court concluded that "now-current medical standards" may have made a material difference in determining whether the defendant had met "his burden of proof to show that he has an intellectual disability," and therefore "remand[ed] for a new *Atkins* hearing, in which the trial court shall consider the evidence presented in light of the standards set out in the DSM–5." *Id.* at 16–17.

C. Stephen Anthony Butler

Butler was convicted in a 1986 robbery-murder and sentenced to death. *Butler v. Quarterman*, 576 F. Supp. 2d 805 (S.D. Tex. 2008), *vacated in part on other grounds*, 2015 WL 5235206 (5th Cir. Sept. 9, 2015). His *Atkins* claim went to trial in 2007 Testimony at the hearing established that Butler had a poor academic history, was labeled "educable mentally retarded," and had speech skills consistent with intellectual disability. *Id.* at 810–12. Moreover, Butler presented evidence through medical experts that "the

state court's failure to find that he suffered from significantly sub-average intellectual functioning before the age of 18 [was] based on the state court's failure" to account for norm obsolescence in evaluating his IQ test scores. *Id.* at 813.

But the state's expert testified that (1) to the extent Butler had low IQ scores, they were because of poor education; (2) to the extent Butler had IQ scores that were old, norm obsolescence should not be taken into account; (3) Butler had no deficits in adaptive functioning because he was able to tell time, maintain his hygiene, and engage in recreational activities; and (4) Butler's extreme communication deficits were the result of severe mental illness, not intellectual disability. *Id.* at 813–27. On these bases, the court concluded that "Butler has not shown by clear and convincing evidence that the state court's findings are incorrect" and therefore denied relief. *Id.* at 816.

Direction from the DSM-5 "could have grounded expert testimony in current scientific thinking, which could have affected the outcome of the [*Butler*] case." Haydt, Greenspan, & Argharkar, *supra*, at 380. "For example, and in direct contradiction to the state expert's testimony," the DSM-5 describes those with mild intellectual disability as potentially able to function "age-appropriately in personal care," as well as having "recreational skills" that "resemble those of age-mates." *Ibid.* Moreover, co-occurring mental illness is "frequent" in intellectual disability. *Ibid.* The use of modern diagnostic criteria could thus have altered the outcome of Butler's case.

D. Paul Hardy and Victor Wayne Hooks

In *United States v. Hardy*, 762 F. Supp. 2d 849, 857 (E.D. La. 2010), the Court considered whether an individual was eligible for the death penalty when he received an IQ score of 73 on a 1996 examination. Under the DSM-IV's criteria for intellectual disability, which defined "[s]ignificantly subaverage intellectual functioning ... as an IQ of about 70 or below," a score of 73 would result in a standard of error range of 68-78, and therefore would be largely above the DSM-IV-TR's floor. DSM-IV 39.

When accounting for norm obsolescence, however, the Court recognized that his IQ "score of 73 is in fact a score of 67.06," rendering Hardy's full IQ score "somewhere between 62.06 and 72.06," and therefore largely within the range recognized in *Atkins*. 762 F. Supp. 2d at 866. Thus, while Hardy might (at best) have been a borderline case without any adjustment, accounting for norm obsolescence clearly established that he possessed an IQ score that demonstrated deficits in intellectual functionality—even when placing heavy reliance on IQ scores alone (which today's diagnostic criteria would not).

By contrast, in *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), the prisoner had similar scores to the petitioner in *Hardy*, but the scores were *not* adjusted for obsolete norms, as the DSM-5 would require—and the prisoner was consequently deemed eligible for the death penalty. Hooks had received an IQ score of 72 in 1994, and an IQ score of 76 in 2002. *Id.* at 1168. The Tenth Circuit concluded that the State court's failure to take norm obsolescence into account did not constitute a violation of *Atkins*. *Id.* at

1170. Because Hooks' unadjusted scores (72 to 76) fell "into a 'gray area,'" the Tenth Circuit concluded that a "rational trier of fact [could] conclude from this evidence that [Hooks] indeed functions at a sub-average intellectual level, but it could also rationally draw the conclusion that he does not." *Id.* at 1171.

Hardy was also specifically disapproved by the Texas courts in *Ex parte Cathey*, 451 S.W. 3d 1, 15 n.43 (Tex. Crim. App. 2014)—which, in turn, led the court below to deny relief to the petitioner here. That further illustrates both the division in authority on the question presented and the life-or-death difference it can make to a condemned prisoner.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

VIRGINIA E. SLOAN
SARAH TUBERVILLE
THE CONSTITUTION
PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, DC 20036

PATRICK MULVANEY
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar St., N.W.
Atlanta, GA 30303

MEIR FEDER
Counsel of Record
IAN SAMUEL
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3755
mfeder@jonesday.com

January 19, 2016

Counsel for Amici Curiae

Supreme Court U.S.
FILED
JAN 19 2016
OFFICE OF THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ELIZABETH B. WYDRA*
BRIANNE J. GOROD
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

January 19, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RECEIVED
JAN 19 2016
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT EXCESSIVE PERIODS OF CONFINEMENT PRIOR TO EXECUTION, ESPECIALLY WHEN SPENT IN SOLITARY CONFINEMENT, VIOLATE THE EIGHTH AMENDMENT	4
A. The Eighth Amendment's Ban On "Cruel and Unusual" Punishment Proscribes Excessive Punishment	4
B. Long-Term Solitary Confinement Violates the Eighth Amendment's Prohibition on Excessive Punishment	7
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

Cases

Davis v. Ayala,
135 S. Ct. 2187 (2015) 3, 8

In re Medley,
134 U.S. 160 (1890) 8, 9

Miller v. Alabama,
132 S. Ct. 2455 (2012) 3, 7

Roper v. Simmons,
543 U.S. 551 (2005) 7, 11

Solem v. Helm,
463 U.S. 277 (1983) 2, 5

Weems v. United States,
217 U.S. 349 (1910) 2

Constitutional Provisions and Legislative Materials

U.S. Const. amend. VIII 2, 4

Books, Articles, and Other Authorities

4 William Blackstone, *Commentaries on the Laws of England* (1769) 5

Am. Civil Liberties Union, *A Death Before Dying: Solitary Confinement on Death Row* (2013), https://www.aclu.org/files/assets/deathbeforedying-report.pdf 2

TABLE OF AUTHORITIES – cont'd.

Page(s)

Amicus Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, *Wilkinson v. Austin*, 545 U.S. 209 (2005), (No. 04-495), 2005 WL 539137 (2005) 9

Atul Gawande, *Hellhole*, The New Yorker, Mar. 30, 2009, http://www.newyorker.com/magazine/2009/03/30/hellhole 11

Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DePaul L. Rev. 567 (1999) 10

Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741 (2015) 10

English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, *available at English Bill of Rights 1689*, Yale L. Sch. Library, http://avalon.law.yale.edu/17th_century/england.asp (last visited July 24, 2015) 3, 6

John F. Cockrell, *Solitary Confinement: The Law Today and the Way Forward*, 37 Law & Psychol. Rev. 211 (2013) 8

TABLE OF AUTHORITIES – cont'd.

Page(s)

John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, 97 Va. L. Rev. 899 (2011) 3, 4, 5, 6, 7

Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115 (2008) 8, 10, 11

Magna Carta of 1215, *available at English Translation of Magna Carta*, The British Library, http://www.bl.uk/magna-carta/articles/magna-carta-english-translation (last visited July 24, 2015) 6

Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441 (2006) 10

Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights, 112 Cong. 21 (2012) .. 9, 11

Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325 (2006) 8

Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450 (1983) 9

TABLE OF AUTHORITIES – cont'd.

Page(s)

Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 Pace Int'l L. Rev. 1 (2006)..... 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the constitutional guarantees the Eighth Amendment protects are respected, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question about whether, consistent with the protections of the Eighth Amendment, an individual may be forced to endure more than three decades on death row, almost half of that time spent living in highly isolated conditions. In this case, Petitioner Bobby James Moore, who was sentenced to death at the age of 20, has spent more than 35 years living on death row, nearly 15 of them (since April 2001) almost continually in "administra-

---

[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

tive segregation," which means he spends more than 22 hours per day alone in his prison cell.

As the Petition demonstrates, "[f]orcing a prisoner to endure decades on death row raises profound constitutional concerns." Pet. 11, 28-33. The Petition sets out three reasons why Moore's case "presents an especially compelling vehicle in which to" address those constitutional concerns: (1) he has been forced to spend an exceptionally long period on death row, (2) his extended confinement on death row is due to "very substantial constitutional claims"; and (3) so much of his time on death row has been spent living in highly isolated conditions. *Id.* at 33-34. This brief in support of the Petition focuses on the third of those reasons and explains why, as the Petition puts it, "[t]he constitutional problems with excessively long periods" on death row "are severely aggravated where, as here (and as is common in death-penalty states), a prisoner on death row is kept alone in his cell for almost the entire day." Pet. 30; *see also* Am. Civil Liberties Union, *A Death Before Dying: Solitary Confinement on Death Row* 2 (2013), https://www.aclu.org/files/assets/deathbeforedying-report.pdf ("Most death row prisoners in the United States are locked alone in small cells for 22 to 24 hours a day . . . .").

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. As this Court has long recognized, "[t]he final clause [of the Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983); *Weems v. United States*, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for

crime should be graduated and proportioned to the offense").

This prohibition on excessive punishment has its roots in the English common law. The Magna Carta, for example, included three chapters that "addressed the problem of excessive" punishments. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, 97 Va. L. Rev. 899, 929, 928 (2011). The English Bill of Rights also embraced this principle of proportionality, using language undeniably similar to the language included in the Eighth Amendment: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, *available at English Bill of Rights 1689*, Yale L. Sch. Library, http://avalon.law.yale.edu/17th_century/england.asp (last visited July 24, 2015). The Framers viewed this principle of proportionality as a critical part of our common law heritage and thus incorporated it into the Eighth Amendment. Stinneford, *supra*, at 943-44.

Reflecting this history, this Court has repeatedly recognized that "[t]he Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). Long-term placement in solitary confinement violates this proscription because, as numerous studies have shown, the psychological damage caused by long-term solitary confinement is incredibly severe—so severe, in fact, as to be excessive with respect to virtually all prisoners. *Cf. Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring)

("[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators"). The psychological damage caused by such an extended stay in solitary confinement makes all the more cruel the execution of an individual who has been so confined. Thus, the fact that Moore has spent almost all of the last fifteen years in solitary confinement provides all the more reason for this Court to use this case to consider the important Eighth Amendment questions raised by extended confinement on death row.

Amicus urges the Court to grant certiorari and hold that an excessive period of confinement after being sentenced to death, especially when that time is spent in solitary confinement, violates the Eighth Amendment prohibition on cruel and unusual punishment.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT EXCESSIVE PERIODS OF CONFINEMENT PRIOR TO EXECUTION, ESPECIALLY WHEN SPENT IN SOLITARY CONFINEMENT, VIOLATE THE EIGHTH AMENDMENT

A. The Eighth Amendment's Ban On "Cruel and Unusual" Punishment Proscribes Excessive Punishment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. As this Court has long recognized, the Eighth Amendment prohibits punishments that are not only barbaric, but also excessive. *See, e.g.*, Stinneford, *supra*, at 910 ("The

Supreme Court has held for the past century that the Cruel and Unusual Punishments Clause prohibits excessive punishments as well as barbaric ones."); *see also Helm*, 463 U.S. at 284 ("The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."

This prohibition on excessive punishment has ancient roots. As one scholar has noted, "[t]he idea that the punishment should fit the crime is as old as Western civilization," and it is "a longstanding theme in the English common law tradition." Stinneford, *supra*, at 927; *see id.* at 931 ("William Bracton, whose work *On the Laws and Customs of England* was the most comprehensive treatment of English law before Blackstone, wrote: 'It is the duty of the judge to impose a sentence no more and no less severe than the case demands.'" (quoting 2 William Bracton, *On the Laws and Customs of England* 299 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (1300))); 4 William Blackstone, *Commentaries on the Laws of England* 17 (1769) ("It is . . . absurd and impolitic to apply the same punishment to crimes of different malignity."). Indeed, "[w]hat differentiates the English (and later the American) legal tradition from that of other societies is that the principle of proportionality in sentencing . . . . was embodied in documents meant to impose such limits: Magna Carta, the English Bill of Rights, and the United States Constitution." Stinneford, *supra*, at 928.

The Magna Carta, for example, included three chapters that "addressed the problem of excessive amercements," the demands that the King would impose on individuals who committed a criminal offense. *Id.* at 929, 928. Chapter 20 provided that "[f]or a trivial offence, a free man shall be fined only

in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood," Magna Carta of 1215, *available at English Translation of Magna Carta*, The British Library, http://www.bl.uk/magna-carta/articles/magna-carta-english-translation (last visited July 24, 2015), while chapters 21 and 22 provided that earls, barons, and clergy "shall be fined only . . . in proportion to the gravity of their offence." *Id.*; *see* Stinneford, *supra*, at 930 (explaining that the Magna Carta prohibitions were "not mere words" because "[s]ome evidence suggests that in the thirteenth and fourteenth centuries, the proscription against excessive amercements was enforced through the writ de moderata misericordia"). This "principle of proportionality also appears to have been considered applicable to cases involving sentences of imprisonment, although this form of punishment was rare prior to the eighteenth century." *Id.* at 931.

This same principle of proportionality was reflected in the English Bill of Rights, which imposed a limitation on the English sovereign in language strikingly similar to that eventually included in the Eighth Amendment: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, *available at English Bill of Rights 1689*, *supra*; *see* Stinneford, *supra*, at 932-37 (discussing cases in which the British Parliament assessed the legality of sentences by considering whether they were excessive to the crime committed).

Thus, when the Framers of the Eighth Amendment incorporated the "cruel and unusual punishments" prohibition in our national charter, they were

acting against the backdrop of the long-established meaning of those terms. *See* Stinneford, *supra*, at 939 (noting that "[t]he phrase 'cruel and unusual' was consistently used as a synonym for 'excessive' in two major areas of law outside of criminal punishment"); *see also id.* at 939-42. And they incorporated this prohibition on "cruel and unusual punishments," including those that are excessive in relation to the crime committed, because they viewed that prohibition as a fundamental part of their common law heritage and the Bill of Rights as their means of ensuring that the federal government would respect that common law heritage. *Id.* at 943-44.

Reflecting this history, this Court has repeatedly recognized that "[t]he Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller*, 132 S. Ct. at 2463 (quoting *Roper*, 543 U.S. at 560). As this Court has explained, this right "flows from the basic '"precept of justice that punishment for crime should be graduated and proportioned to [the] offense."'" *Roper*, 543 U.S. at 560 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). Moreover, by extending this protection even to "those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Id.* As the next Section explains, long-term placement in solitary confinement violates that fundamental constitutional requirement.

B. Long-Term Solitary Confinement Violates the Eighth Amendment's Prohibition on Excessive Punishment

Long-term placement in solitary confinement violates the Eighth Amendment's proscription on "cruel and unusual punishment" because long-term place-

ment in such restrictive and dehumanizing conditions is likely excessive with respect to virtually all inmates, even those who commit capital offenses.[2] As Justice Kennedy noted just last Term, "[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators." *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring); *see id.* at 2210 ("research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price"); *see also In re Medley*, 134 U.S. 160, 170 (1890) (solitary confinement carries "'a further terror and peculiar mark of infamy'").

In fact, numerous studies have documented the severe psychological strain that solitary confinement imposes. As one expert in the field has explained, "[t]he restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning," producing "florid delirium—a confusional psychosis" in some inmates. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325,

---

[2] Although this brief argues that long-term solitary confinement violates the Eighth Amendment because it is likely excessive with respect to virtually all inmates, *amicus* notes that such long-term solitary confinement might also constitute barbarous treatment and be prohibited by the Eighth Amendment for that reason, as well. *See, e.g.*, John F. Cockrell, *Solitary Confinement: The Law Today and the Way Forward*, 37 Law & Psychol. Rev. 211, 213 (2013) ("Given the symptoms associated with solitary confinement, the word 'torture' may not be an inappropriate description of the conditions imposed."); Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 122 (2008) ("International law also supports the proposition that very lengthy, virtually permanent conditions of harsh solitary confinement constitute either torture or cruel, inhuman, and degrading treatment.").

354 (2006); *see* Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1452 (1983) (describing how inmates often hallucinated, heard voices, and experienced "shortness of breath, panic, tremulousness, and dread of impending death"). Another has noted that "for some prisoners . . . solitary confinement precipitates a descent into madness." *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights*, 112 Cong. 21 (2012) [hereinafter *Reassessing Solitary Confinement Hearing*].

Indeed, one study found that the conditions of solitary confinement were so severe and difficult that almost every prisoner living under such conditions attempted to commit suicide. *See* Amicus Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, *Wilkinson v. Austin*, 545 U.S. 209 (2005), (No. 04-495), 2005 WL 539137, at *16 (2005) [hereinafter Psychology Amicus Brief] (citing Thomas B. Benjamin & Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine Prison*, 9 Clearinghouse Rev. 83-90 (1975)); *see generally In re Medley*, 134 U.S. at 168 (noting that after a short period in solitary confinement, "[a] considerable number of the prisoners fell . . . into a semi-fatuous condition . and others became violently insane; others still, committed suicide"). These accounts are not anomalous; as three psychiatrists put it, "[t]he overall consistency of these findings—the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods—is striking." Psy-

chology Amicus Brief, *supra*, at *22; *see* Lobel, *supra* note 2, at 118 ("'[n]o study of the effects of solitary . . . that lasted longer than 60 days failed to find evidence of negative psychological effects'" (quoting Psychology Amicus Brief, *supra*, at *4)).

It bears emphasis that "negative (sometimes severe) health effects can occur after only a few days of solitary confinement," and "[t]he health risk rises for each additional day in solitary confinement." Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 488-97 (2006); *see also* Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 Pace Int'l L. Rev. 1, 11-12 (2006) ("[T]he longer an individual experiences conditions of isolation, the likelier they are to develop significant mental illness."); Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DePaul L. Rev. 567, 584 (1999) ("the longer the period of time an inmate remains in solitary confinement, the greater the risk that the inmate will need to seek psychiatric hospitalization"). It is no wonder then that the psychological consequences for those who are held in solitary confinement for years and years can be profoundly negative.

Nor is it surprising that long-term solitary confinement would produce such negative psychological effects. After all, solitary confinement denies prisoners the basic human need of social interaction. Without such interaction, humans lose the ability to "establish and sustain a sense of identity and to maintain a grasp on reality." Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel*

and Far Too Usual Punishment, 90 Ind. L.J. 741, 776 (2015). One individual who had been in isolation for almost twenty-five years described his confinement as a "slow constant peeling of the skin, stripping of the flesh." Lobel, *supra*, at 116. Senator John McCain, who spent more than two years in isolation as a POW in North Vietnam, described how solitary confinement "crushes your spirit and weakens your resistance more effectively than any other form of mistreatment." Atul Gawande, *Hellhole*, The New Yorker, Mar. 30, 2009, http://www.newyorker.com/magazine/2009/03/30/hellhole. And other statements by those who have spent time in solitary confinement are consistent with these accounts. *See, e.g.*, *Reassessing Solitary Confinement Hearing*, *supra*, at 321 ("I felt neglected and completely invisible. I felt like I didn't mean anything."); *id.* at 326 ("As the time went by and I remained in the gray box I degenerated even worse. I lost the will to live. I lost hope, even though I was scheduled to be released in a couple years. Depression overwhelmed me."); *id.* at 339 ("There's no describing the day to day assault on your body and your mind and the feelings of hopelessness and despair.").

In sum, the accounts of individuals who have spent extended periods of time in solitary confinement confirm what countless studies make clear: solitary confinement, especially long-term solitary confinement, is so inhumane and dehumanizing as to be excessive in relation to virtually any individual. It denies these individuals the "dignity" that the Eighth Amendment guarantees all individuals, even those who have committed heinous crimes. *Roper*, 543 U.S. at 560.

This Court should thus grant certiorari and hold that an excessive period of confinement after being

sentenced to death, especially when much of that time is spent in solitary confinement, violates the Eighth Amendment prohibition on cruel and unusual punishment.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ELIZABETH B. WYDRA*
BRIANNE J. GOROD
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

January 19, 2016

* Counsel of Record

Supreme Court, U.S.
FILED
JAN 19 2016

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF INTERNATIONAL LAW AND HUMAN RIGHTS INSTITUTES, SOCIETIES, PRACTITIONERS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

(*Amici* Listed On Inside Cover)

LUCY MARTINEZ
ANASTASIA DAVIS BONDARENKO
THREE CROWNS LLP
New Fetter Place
8-10 New Fetter Lane
London, EC4A1AZ
United Kingdom
+44 (203) 530-7959
lucy.martinez@
threecrownsllp.com

CONSTANCE DE LA VEGA
Counsel of Record
UNIVERSITY OF
SAN FRANCISCO
SCHOOL OF LAW
2130 Fulton Street
San Francisco, CA 94117
(415) 422-2296
delavega@usfca.edu

Counsel for Amici Curiae

January 19, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

LIST OF *AMICI* AND ADDITIONAL COUNSEL

Amici Organizations

1. Bar Human Rights Committee of England and Wales
2. European Criminal Bar Association
3. Human Rights Advocates
4. Human Rights Institute, Columbia Law School, Columbia University (New York)
5. Human Rights Institute of the Paris Bar Association / Institut des Droits de l'Homme du Barreau de Paris
6. Human Rights League / Ligue des Droits de l'Homme (France)
7. International Bar Association's Human Rights Institute
8. International Federation for Human Rights / Fédération Internationale des ligues des Droits de l'Homme (FIDH)
9. National Bar Council / Le Conseil National des Barreaux (France)
10. Paris Bar / Le Barreau de Paris

Amici Individuals

11. The Hon. Louise Arbour C.C., G.O.Q., Counsel at Borden Ladner Gervais LLP; former UN High Commissioner for Human Rights; former Justice of the Supreme Court of Canada

12. Emeritus Professor Robert Badinter, Paris I University (Panthéon - Sorbonne); former Minister of Justice (France); former President of the Constitutional Council of France
13. Professor Brian Burdekin AO, Professorial Visiting Fellow, University of New South Wales, Australia; Visiting Professor, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Sweden; former Federal Human Rights Commissioner of Australia
14. Professor David Caron, Dean and Professor of Law, The Dickson Poon School of Law, King's College, London; former President of the American Society of International Law
15. Professor Sarah H. Cleveland, Louis Henkin Professor of Human and Constitutional Rights, Columbia Law School; Member of UN Human Rights Committee (signing in her personal capacity)
16. Mark George QC, Garden Court North Chambers, Manchester
17. Professor Guy S. Goodwin-Gill, Emeritus Fellow, All Souls College, University of Oxford
18. Professor Carolyn Hoyle, Director, Centre for Criminology, University of Oxford
19. Professor Julian Killingley, Professor of American Public Law, Centre for American Legal Studies, School of Law, Birmingham City University
20. Professor Robert McCorquodale, Director of the British Institute of International and Comparative Law
21. Professor Juan Méndez, UN Special Rapporteur on Torture and Other Cruel, Inhuman and

Degrading Treatment or Punishment (*UN Special Rapporteur on Torture*)*; Professor of Human Rights Law in Residence at American University

22. Geoffrey Robertson QC, Founder and Joint Head of Doughty Street Chambers (London)

23. Emeritus Professor Sir Nigel Rodley KBE, Chair of the Human Rights Centre, University of Essex; President of International Commission of Jurists; Member of UN Human Rights Committee; former UN Special Rapporteur on Torture

24. Professor William Schabas, Professor of International Law, Middlesex University (London); Consultant on capital punishment for United Nations Office of Drugs and Crime; Drafter of 2010 and 2015 reports of UN Secretary-General on status of death penalty

25. Professor Theo van Boven, Honorary Professor of International Law at University of Maastricht; former UN Special Rapporteur on Torture; former U.N. Director of Human Rights

26. Dr Philippa Webb, Reader (Associate Professor) in Public International Law, King's College London; Member of International Advisory Panel for American Law Institute's project *Restatement Fourth, Foreign Relations Law* of the United States

---

* This brief is submitted by the UN Special Rapporteur on Torture without prejudice to, and should not be considered an express or implied waiver of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Additional Counsel

Constantine Partasides QC, Penny Martin and Mark Wassouf (Admitted in England and Wales)
Three Crowns LLP, London

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. The role of international and foreign jurisprudence in interpreting the U.S. Constitution	4
B. The origins of the Eighth Amendment: the 1689 English Bill of Rights prohibits execution after an excessively long period of incarceration under a death sentence	8
C. Other jurisdictions confirm that to carry out the death penalty after an excessively long period constitutes cruel and unusual punishment	14
1. *European Court of Human Rights*	14
2. *Inter-American Commission and Court of Human Rights*	17
3. *UN Human Rights Committee*	19
4. *UN Committee Against Torture and UN Special Rapporteur on Torture*	20
5. *Decisions of courts of other common law countries*	23
CONCLUSION	24

TABLE OF CONTENTS—Continued

Page

APPENDIX: List of *Amici*

Organizations 1a

Individuals 5a

TABLE OF AUTHORITIES

CASES Page(s)

Atkins v. Virginia,
536 U.S. 304 (2002) 6

Coker v. Georgia,
433 U.S. 584 (1977) 7

Enmund v. Florida,
458 U.S. 782 (1982) 7

Ford v. Wainwright,
477 U.S. 399 (1986) 9

Foster v. Florida,
537 U.S. 990 (2002) 11, 15, 23

Glossip v. Gross,
135 S.Ct. 2726 (2015) 3, 11, 14, 23

Gregg v. Georgia,
428 U.S. 153 (1976) 8

Harmelin v. Michigan,
501 U.S. 957 (1991) 8

In re Kemmler,
136 U.S. 436 (1890) 8

In re Medley,
134 U.S. 160 (1890) 13

Knight v. Florida,
528 U.S. 990 (1999) 24

Lackey v. Texas,
514 U.S. 1045 (1995) 11

Lawrence v. Texas,
539 U.S. 558 (2003) 15

Paquete Habana,
175 U.S. 677 (1900) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Roper v. Simmons,
543 U.S. 551 (2005) 6, 8

Thompson v. Oklahoma,
487 U.S. 815 (1988) 7

Trop v. Dulles,
356 U.S. 86 (1958) 6, 7, 8

Weems v. United States,
217 U.S. 349 (1910) 8

CONSTITUTIONS

U.S. Const. amend. VIII ..... *passim*

Jamaica Const., § 17(1) 11

INTERNATIONAL CASES

Case 2141 (United States),
Inter-Am. Comm'n H.R., Res. No. 23/81,
OEA/Ser.L/V/ II.54, doc. 9 rev. 1 (1981) ... 17

Denton Aitken v. Jamaica, Case 12.275,
Inter-Am. Comm'n H.R., Rep. No. 58/02,
doc. 5 rev. 1 (2002) 18

Francis v. Jamaica, Communication No.
606/1994 (adopted July 25, 1995), U.N.
Doc. CCPR/C/54/D/606/1994
(Aug. 3, 1995) 20

Guerra v. Baptiste,
[1996] 1 A.C. 397 (P.C.) 414 13

Higgs v. Minister of Nat'l Sec.,
[2000] 2 A.C. 228 (P.C.) 247 13

TABLE OF AUTHORITIES—Continued

Page(s)

Hilaire, Constantine and Benjamin v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94 (June 21, 2002) 18

Ilaşcu v. Moldova & Russia, App. No. 48787/99, 40 Eur. H.R. Rep. 46 (2005) 17

Jabar bin Kadermastan v. Pub. Prosecutor, [1995] SGCA 18, [1995] 1 SLR(R) 326 24

Jagdish v. State of Madhya Pradesh, [2009] INSC 1608 24

N.I. Sequoyah v. United States, Petition 120-07, Inter-Am. Comm'n H.R., Rep. No. 42/10 (2010) 18

Piechowicz v. Poland, App. No. 20071/07, 60 Eur. H.R. Rep. 24 (2015) 17

Pratt v. Att'y-Gen. for Jamaica, [1994] 2 A.C. 1 (P.C.) 18 ..... *passim*

Riley v. Att'y-Gen. of Jamaica, [1983] 1 A.C. 719 (P.C.) 734-35 ..... 3, 11

Shatrughan Chauhan v. Union of India, (2014) 3 S.C.C. 1, [2014] INSC 44 24

Sher Singh v. State of Punjab, A.I.R. 1983 S.C. 465 23

TABLE OF AUTHORITIES—Continued

Page(s)

Soering v. United Kingdom,
App. No. 14038/88,
11 Eur. H.R. Rep. 439 (1989) 15, 18

United States v. Burns,
[2001] 1 S.C.R. 283 23

William Andrews v. United States,
Case 11.139, Inter-Am. Comm'n H.R.,
Rep. No. 57/96, OEA/Ser.L/V/II.98,
doc. 6 rev. (1998) 19

FOREIGN STATUTES

English Bill of Rights (1689),
1 William & Mary Sess 2 c 2 ..... *passim*

§ 10 ..... 9, 10

Stat. of 6 and 7 William IV. c. 30 13

INTERNATIONAL CONVENTIONS
INSTRUMENTS AND OTHER DOCUMENTS

American Convention on Human Rights,
Nov. 22, 1969, 1144 UNTS 143,
Art. 5(2) 17

American Declaration of the Rights and
Duties of Man, O.A.S. Res. XXX, adopted
by the Ninth International Conference of
American States (1948), *reprinted in*
OEA/Ser.L.V/II.82 doc.6 rev.1 (1992),
Art. 26 17

TABLE OF AUTHORITIES—Continued

Page(s)

Comments of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995) 20

Concluding observations of the Committee against Torture: Zambia, U.N. Doc. CAT/C/ZMB/CO/2 (May 26, 2008) 21

Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA /CO/3-5 (Dec. 19, 2014) 21

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment:

Interim report, U.N. Doc. A/66/268 (Aug. 5, 2011) 22

Interim report, U.N. Doc. A/67/ 279 (Aug. 9, 2012) 22

Interim report, U.N. Doc. A/68/295 (Aug. 9, 2013) 22

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), Art. 3 ..... 14, 15, 16

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by U.S. on June 8, 1992), Art. 7 ..... 19, 20

Additional Protocol 20

TABLE OF AUTHORITIES—Continued

Page(s)

U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, 1465 U.N.T.S. 85 20

U.N. Human Rights Committee, *CCPR General Comment 20: Art. 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (adopted Mar. 10, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008) 20

RULES

Resolution 70/175 adopted by U.N. General Assembly on December 17, 2015, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, U.N. Doc. A/RES/70/175, Jan. 8, 2016, Rules 43 to 45 23

OTHER AUTHORITIES

136 Cong. Rec. 36192-36199 (Oct. 27, 1990) 21

THE DECLARATION OF INDEPENDENCE (U.S. 1776) 4, 5

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994-1995) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253 (1999-2000)..... 5

Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57(4) Cal. L. Rev. 839 (1969)..... 9

Brent E. Newton, *The Slow Wheels of* Furman's *Machinery of Death*, 13 J. App. Prac. & Process 41 (2012)..... 10

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST[1]

Amici are international law and human rights institutes, societies, associations, organizations, practitioners, and/or scholars. *Amici* hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of Petitioner's petition for certiorari. The interests of *Amici* are described in detail in the Appendix. Many of the individual *Amici* were personally involved in the international and foreign law authorities cited in this brief. Many of the *Amici* organizations have engaged this Court, and other courts and tribunals around the world, in defense of the rule of law and individual rights, especially the advancement of human rights. *Amici* respectfully urge this Court to consider these international and foreign law authorities in determining this petition.

STATEMENT OF THE CASE

For the purposes of this brief, *Amici* adopt the statement of facts in the Petition for a Writ of Certiorari filed by Bobby James Moore on December 15, 2015.

---

[1] Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, and/or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. *Amici* timely notified all parties of their intention to file this brief, and, pursuant to Rule 37.2(a), confirmation of consent from all parties to the filing of this brief has been submitted to the Clerk of the Court.

SUMMARY OF ARGUMENT

The United States Supreme Court has its own rich jurisprudence regarding the definition and scope of "cruel and unusual punishments" under the Eighth Amendment to the Constitution. As this Court has a long history of having regard to international and foreign jurisprudence, this brief summarizes the available jurisprudence.

Amici submit that execution following prolonged detention violates constitutional rights and/ or international human rights norms which are broadly the same as those protected by the Eighth Amendment. Clear consensus has emerged in international and regional courts and institutions around the world that execution of those subject to prolonged incarceration under a death sentence is unconstitutional and/ or in violation of international human rights norms, because it adds a significant degree of suffering and punishment over and beyond the judicial sanction of the death sentence itself, and accordingly amounts to cruel, unusual, inhuman and/or degrading treatment. Put simply, such treatment is an affront to the human dignity of the convicted. This harm is aggravated when the convicted is also subjected to extended periods of solitary confinement.

As two judges on the Judicial Committee of the Privy Council (Privy Council)[2] have noted:

---

[2] The Privy Council sits in the United Kingdom and is the final court of appeal for several independent Commonwealth countries, British overseas territories and British Crown dependencies, including Commonwealth countries in the Caribbean, with the exception of Barbados, Belize and Guyana.

> It is no exaggeration . . . to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading.

Riley v. Att'y-Gen. of Jamaica, [1983] 1 A.C. 719 (P.C.) 735 (citations omitted).[3]

Moreover, courts around the world have recognized that the penological purposes of the death penalty - namely, deterrence and retribution - are not served when execution occurs after an excessively long period of incarceration under a death sentence. These courts have also recognized that the convicted cannot be criticised for exploring any available legitimate legal avenue.

These general conclusions of numerous jurisdictions are particularly compelling in the present case. The circumstances of Mr. Moore's detention awaiting execution are unusually extreme: he has been on death row for some 35 years, and held in solitary confinement ("administrative segregation") since 2001: 14 years of spending approximately 22.5 hours per day, every day, alone in his cell. Twice in these 35 years, the State has signed death warrants and set his execution date; one death warrant was stayed less than 24 hours before he

---

[3] Dissenting judgment of Lords Scarman and Brightman, cited in *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015) (Breyer, J., dissenting). In 1993, the Privy Council accepted this view. See Section B below.

was to be executed, and the other five days before the scheduled execution date.

Amici submit that to execute Mr. Moore after 35 years, and after he has spent 14 years of this period in solitary confinement, would constitute cruel and unusual punishment (or the equivalent legal standard) under any of the national, regional and international legal systems discussed herein. Indeed, the delay in Mr. Moore's case far exceeds the periods of time found to be unacceptable in other jurisdictions.

ARGUMENT

A. The role of international and foreign jurisprudence in interpreting the U.S. Constitution

International law and opinion, and the practice of other nations, have informed the laws of the United States from the Declaration of Independence through to today. Indeed, the Declaration of Independence itself speaks of the relevance of other nations:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

In urging courts to afford the "decent respect to the opinions of mankind" required by the Declaration of Independence, Justice Blackmun explained that:

> [T]he early architects of our Nation understood that the customs of nations—the global opinions of mankind—would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 39 (1994-1995) (citation and footnotes omitted).

Consistent with the approach of the Founders, this Court has repeatedly recognized the relevance of international norms to the evolution of societal norms and to the scope and content of Constitutional rights,[4] including the Eighth Amendment. For example, in

---

[4] *See also, e.g.*, *Paquete Habana*, 175 U.S. 677, 700 (1900) (Gray, J., delivering opinion of Court) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . "); Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999-2000) ("comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.") (emphasis in original).

Roper v. Simmons, 543 U.S. 551 (2005), in abolishing executions for juvenile offenders, the Court noted:

> [A]t least from the time of the Court's decision in *Trop* [1958], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments.". . .
>
> . . . .
>
> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* . . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Id. at 575, 578.[5]

Other examples of the Court considering international and foreign law in relation to the death penalty include:

- *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002): "within the world community, the imposition of the death penalty for crimes

---

[5] *See also Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting) ("[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.").

committed by mentally retarded offenders is overwhelmingly disapproved."

- *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31 (1988): "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. . . . We have previously recognized the relevance of the views of the international community in deter-mining whether a punishment is cruel and unusual."

- *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982): "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.' *Coker v. Georgia*, 433 U.S. 584, 596, n. 10 (1977)." Also "noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."

- *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977): considering "the climate of international opinion concerning the acceptability of a particular punishment," (citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958)) and noting that it was "not irrelevant here that out of 60 major nations in the world . . . only 3

retained the death penalty for rape where death did not ensue."

- *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (Warren, J., plurality opinion): "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."

B. The origins of the Eighth Amendment: the 1689 English Bill of Rights prohibits execution after an excessively long period of incarceration under a death sentence

The Constitutional provision at issue in this case, the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted," traces its origins to the laws of another nation. The phrase was taken directly from the English Bill of Rights of 1689, and had its origins in the Magna Carta. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 100 (1958) (Warren, J., plurality opinion) (referring to "the Anglo-American tradition of criminal justice."); *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976); *Weems v. United States*, 217 U.S. 349, 371-72 (1910) (McKenna, J., delivering the opinion of the Court) (discussing English law). *Id.* at 389 (White, J., dissenting) (referring to, *inter alia*, the Eighth Amendment's "origin in the mother country, and the meaning there given to it prior to the American Revolution; . . . ."); *In re Kemmler*, 136 U. S. 436, 446 (1890).

As the Court stated in *Roper v. Simmons*, 543 U.S. 551, 577 (2005):

> [I]t is instructive to note that the United Kingdom abolished the juvenile death penalty

> before these [international] covenants [prohibiting the practice] came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights
> . . . .

The phrase "cruel and unusual punishment" in the 1689 Bill of Rights was intended to ensure "fairness" in respect of both the type and length of punishment:

> The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties.

Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57(4) Cal. L. Rev. 839, 860 (1969).

This is particularly relevant in light of the Court's conclusion that "the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the [1791 U.S.] Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). In this context, it is instructive to note that Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence. *See Pratt v. Att'y-Gen. for Jamaica*, [1994] 2 A.C. 1, (P.C.) 18;

see also Brent E. Newton, *The Slow Wheels of* Furman's *Machinery of Death*, 13 J. App. Prac. & Process 41, 55-57 & nn.64-70 (2012), noting the "prevailing view in England and the colonies at the time of America's independence" that delays of "several months" of confinement under a death sentence would be cruel and unusual punishment. Thus, the original understanding of the Eighth Amendment in 1791 would have prohibited prolonged periods of incarceration under a death sentence, followed by execution.

This is consistent with the 1983 opinion of two judges in the Privy Council, Lords Scarman and Brightman:

> [T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689.
>
> Such research as we have been able to conduct shows that many judges in other countries have recognized the inhumanity and degradation a delayed death penalty can cause. We cite four instances (but there are many others). . . . (Citations to U.S., India, and European Court of Human Rights omitted.)
>
> It is no exaggeration, therefore, to say that the jurisprudence of the civilized world, *much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights,* has recognized and acknowledged that prolonged delay in executing a sentence

> of death can make the punishment when it comes inhuman and degrading.

Riley v. Att'y-Gen. of Jamaica, [1983] 1 A.C. 719 (P.C.) 734-35 (emphasis added).[6]

Subsequent decisions of the Privy Council have recognized the core principles underlying the 1689 Bill of Rights.[7] The seminal decision is *Pratt v. Attorney-General for Jamaica*, [1994] 2 A.C. 1 (P.C.), where the Privy Council held that to execute the applicants after a prolonged delay on death row of 14 years was unconstitutional. *Id.* at 33.[8] Lord Griffiths, delivering the judgment of the Court, said:

> It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the

---

[6] Dissenting opinion cited by Justice Breyer (in dissent) in *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015) and adopted in *Pratt v. Attorney-General for Jamaica*, discussed below.

[7] See *supra* footnote 2 regarding the Privy Council, which is a regional Commonwealth court (as opposed to a domestic U.K. court).

[8] In *Riley* and *Pratt*, the relevant standard was Section 17(1) of the Jamaica Constitution: "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment." *Pratt* was cited by this Court in, *e.g.*, *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari); *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting); *Glossip v. Gross*, 135 S.Ct. 2726, 2767, 2769 (2015) (Breyer, J., dissenting).

> sentence commuted to one of life imprisonment.

Id. at 19.

In reaching its conclusion that execution following many years after sentence would be unconstitutional, the Privy Council noted:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Id. at 29.[9]

The Privy Council concluded:

> The total period of delay is shocking and now amounts to almost 14 years. . . .
>
> To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment. . . . In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is

---

[9] *See also Pratt v. Att'y-Gen. for Jamaica*, [1994] 2 A.C. 1 (P.C.), 18 (quoting Mr. Winston Churchill: "[P]eople ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever their crime. This is a wrong thing.").

> wholly unacceptable and this appeal must be allowed.

Id. at 33.

In *Pratt*, the Privy Council held that execution after more than a five-year period of incarceration under a death sentence was unconstitutional (although the actual case before the court involved 14 years). In later cases, the Privy Council found that four-years and ten months was unconstitutional, and stated that the five-year rule in *Pratt* "was not intended to provide a limit, or a yardstick . . . ." *Guerra v. Baptiste*, [1996] 1 A.C. 397 (P.C.) 414. In 2000, the Privy Council affirmed the key findings in *Pratt*, namely that "execution after excessive delay" was an "inhuman punishment because it add[s] to the penalty of death the additional torture of a long period of alternating hope and despair." *Higgs v. Minister of Nat'l Sec.*, [2000] 2 A.C. 228 (P.C.) 247 (appeal taken from Bah.).

English law has also long confirmed the dangers of extended periods of solitary confinement under a death sentence. For example, in *In re Medley*, 134 U.S. 160, 170 (1890), this Court discussed the "statutory history of solitary confinement in the English law", and noted that solitary confinement:

> was considered as an additional punishment of such a severe kind that it is spoken of in the [statutory] preamble as 'a further terror and peculiar mark of infamy' to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and by the statute of 6 and 7 William IV. c. 30, the additional punishment of solitary confinement was repealed.

This Court also noted that

> when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. *Id.* at 172.

In light of the historical connections between the Eighth Amendment and the English Bill of Rights, these cases are particularly persuasive. As explained below, these authorities have been echoed by numerous international, regional and domestic courts and tribunals.

C. Other jurisdictions confirm that to carry out the death penalty after an excessively long period constitutes cruel and unusual punishment

1. European Court of Human Rights

Article 3 of the European Convention on Human Rights (*ECHR*) provides: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[10] In interpreting this provision, the European Court of Human Rights (*ECtHR*) has long recognized the cruel and unusual nature of prolonged

---

[10] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

death row detention. The leading case is *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).[11] In this case, the ECtHR held that the extradition of a person to the U.S. would violate Article 3 of the ECHR, due to the circumstances in which a "condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." *Id.* ¶ 106.

The ECtHR noted:

> In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment . . . . In this connection, account is to be taken not only of the physical pain experienced but also, *where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.*
>
> . . . .

---

[11] Cited in, *e.g.*, *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting); *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015) (Breyer, J., dissenting). This Court has looked to ECtHR decisions in other contexts. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing ECtHR decisions, also referring to "values we share with a wider civilization" and actions taken by "[o]ther nations . consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.").

> The manner in which [the death penalty] is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3). . . .
>
> . . .
>
> For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. . . .
>
> However, in the Court's view, having regard to the *very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty*, and to the personal circumstances of the applicant, *especially his age and mental state at the time of the offence*, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.

Id. ¶¶ 100-01, 104, 111 (emphasis added).

In relation to solitary confinement, the ECtHR has confirmed that sensory and social isolation "can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."[12] The ECtHR has described solitary confinement as "a form of 'imprisonment within the prison'" to be imposed "only exceptionally and after every precaution has been taken . . . ."[13]

2. *Inter-American Commission and Court of Human Rights*

Article 5(2) of the American Convention on Human Rights (*ACHR*) prohibits "cruel, inhuman, or degrading punishment or treatment"[14] and Article 26 of the American Declaration of the Rights and Duties of Man (*AD*) prohibits "cruel, infamous or unusual punishment."[15] The ACHR and AD are interpreted by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, which have

---

[12] *Ilaşcu v. Moldova & Russia*, App. No. 48787/99, 40 Eur. H.R. Rep. 46, ¶ 432 (2005).

[13] *Piechowicz v. Poland*, App. No. 20071/07, 60 Eur. H.R. Rep. 24, ¶ 165 (2015).

[14] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The U.S. has not yet ratified the ACHR.

[15] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by Ninth International Conference of American States (1948), *reprinted in* OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). The Inter-American Commission has held that the AD gives rise to binding legal obligations on the U.S. *See, e.g.*, Case 2141 (United States), Inter-Am. Comm'n H.R., Resolution No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶¶ 15-17 (1981).

repeatedly affirmed that a prolonged period of detention while awaiting execution constitutes "cruel", "inhuman", "degrading" and/ or "unusual" treatment:

- *N.I. Sequoyah v. United States*, Petition 120-07, Inter-Am. Comm'n H.R., Report No. 42/10, ¶¶ 38, 49 (2010) (Admissibility Decision): a person detained on death row for 15 years is not required to exhaust domestic remedies since these delays were deemed unwarranted and were preventing the exhaustion of remedies to present a valid claim before the Commission. Also, "the claims regarding the undue delay in the process of Mr. Sequoyah's appeal and the related prolonged period of incarceration on death row are not manifestly groundless or out of order."

- *Denton Aitken v. Jamaica*, Case 12.275, Inter-Am. Comm'n H.R., Report No. 58/02, doc. 5 rev. 1 at 763, ¶¶ 133-34 (2002): "detention conditions, when considered in light of the lengthy period of nearly four years for which he has been detained on death row, fail to satisfy the standards of humane treatment." These conditions included "solitary confinement on death row, in confined conditions with inadequate hygiene, ventilation and natural light."

- *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 167 (June 21, 2002): affirming the ECtHR's holding in *Soering v. United Kingdom* that "the 'death row

> phenomenon' is a cruel, inhuman and degrading treatment, and is characterized by a prolonged period of detention while awaiting execution . . . ."

- *William Andrews v. United States*, Case 11.139, Inter-Am. Comm'n H.R., Report No. 57/96, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 178 (1998): "He spent eighteen years on death row, and was not allowed to leave his cell for more than a few hours a week. . . . [T]he Commission finds that the United States violated Mr. Andrews' right not to receive cruel, infamous or unusual punishment pursuant to Article XXVI of the American Declaration."

3. UN Human Rights Committee

Article 7 of the International Covenant on Civil and Political Rights (*ICCPR*) provides that: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[16]

The United Nations Human Rights Committee (*UNHR Committee*) is the body responsible for monitoring States Parties' compliance with the ICCPR, and interpreting its provisions. This Committee has stated that Article 7 requires the death penalty to "be carried out in such a way as to cause the least possible physical and mental suffering," and noted that "prolonged solitary confinement of the detained or imprisoned person

---

[16] On June 8, 1992, the U.S. ratified the ICCPR, subject to certain reservations, including in relation to the imposition of the death penalty. These standards are thus part of U.S. law, pursuant to the Supremacy Clause.

may amount to acts prohibited by article 7." *CCPR General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (adopted Mar. 10, 1992), ¶ 6, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008).

In relation to the United States' implementation of Article 7, the UNHR Committee has expressed concern regarding "the long stay on death row . . . ." in the U.S., "which, in specific instances, may amount to a breach of article 7." *Comments of the Human Rights Committee: United States of America*, ¶ 16, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995).

In deciding an individual communication under the Additional Protocol to the ICCPR, the UNHR Committee found a breach of Article 7 in a case involving, *inter alia*, extended death row detention of nearly 12 years. *See Francis v. Jamaica*, Communication No. 606/1994 (adopted July 25, 1995), ¶¶ 9.1-9.2, U.N. Doc. CCPR/C/54/D/606/1994 (Aug. 3, 1995) (nearly 12 years on death row in dehumanizing conditions, followed by commutation of death sentence, was cruel, inhuman and degrading punishment, "bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.").

4. UN Committee Against Torture and UN Special Rapporteur on Torture

In 1984, the U.N. adopted and opened for signature the Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment.[17] The implementation of this Convention is monitored by the U.N. Committee Against Torture (*UNCAT*).

The UNCAT has expressed "concern at the conditions of detention of convicted prisoners on death row, which may amount to cruel, inhuman or degrading treatment, in particular due to overcrowding, and the excessive length of time on death row . . . ." *Concluding observations of the Committee against Torture: Zambia*, ¶ 19, U.N. Doc. CAT/C/ZMB/CO/2 (May 26, 2008). It also stated that, where such circumstances exist, "the State party should ensure that its legislation provides for the possibility of the commutation of a death sentence where there have been delays in its implementation." *Id.*

Commenting specifically on the United States, the UNCAT recently expressed concern "at the continued delays in recourse procedures, which keep prisoners sentenced to death in a situation of anguish and incertitude for many years." *Concluding observations on the combined third to fifth periodic reports of the United States of America*, ¶ 25, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014). The Committee concluded that "in certain cases, such situation amounts to torture . . . ." and encouraged the U.S. to "reduce the procedural delays that keep prisoners sentenced to capital punishment in death row for

---

[17] In 1994, the U.S. ratified this Convention, subject to certain declarations and reservations, including a statement that the Convention does not "restrict or prohibit the [U.S.] from applying the death penalty consistent with the Constitution . , including any constitutional period of confinement prior to the imposition of the death penalty." 136 Cong. Rec. 36192-36199 (Oct. 27, 1990).

prolonged periods." *Id.* The Committee also noted concerns regarding solitary confinement. *Id.*, ¶ 20.

Similarly, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professor Juan Mendez (*U.N. Special Rapporteur*), has recognized that "lack of notice as to the date of the execution . . ." compounds the "mental trauma of persons sentenced to death."[18] The U.N. Special Rapporteur has also emphasized that "solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions."[19] In an August 2013 report to the U.N. General Assembly, the U.N. Special Rapporteur noted that "[p]rison regimes of solitary confinement often cause mental and physical suffering or humiliation that amounts to cruel, inhuman or degrading treatment or punishment."[20] In December 2015, the U.N. General

---

[18] See Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (*Special Rapporteur on Torture*), *Interim report*, ¶ 50, U.N. Doc. A/67/279 (Aug. 9, 2012) (Juan Méndez).

[19] Special Rapporteur on Torture, *Interim report*, ¶¶ 79-81, U.N. Doc. A/66/268 (Aug. 5, 2011) (Juan Méndez).

[20] Special Rapporteur on Torture, *Interim report*, ¶ 60, U.N. Doc. A/68/295 (Aug. 9, 2013) (Juan Méndez). See also United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, *Draft Resolution: Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, U.N. Doc. E/CN.15/2015/L.6/Rev.1, May 21, 2015, Rule 43 (prohibiting "indefinite" and/or "prolonged" solitary confinement).

Assembly passed a Resolution specifically prohibiting indefinite and/or prolonged solitary confinement.[21]

5. Decisions of courts of other common law countries

Many courts in common law countries have expressed grave concern about the length of time prisoners spend on death row prior to execution, and the consistency of such practice with constitutional provisions and/or international human rights norms:

- Canada: *United States v. Burns*, [2001] 1 S.C.R. 283, paras. 94, 122-24, 132 (Canadian Supreme Court quoting *Pratt*, and finding that *inter alia*, the potential for lengthy incarceration before execution is "a relevant consideration" in determining whether extradition to the U.S. violates the "principles of fundamental justice").[22]
- India: *Sher Singh v. State of Punjab*, A.I.R. 1983 S.C. 465 (Indian Constitution protects individuals against prolonged incarceration

---

[21] Resolution 70/175 adopted by U.N. General Assembly on December 17, 2015, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, U.N. Doc. A/RES/70/175, Jan. 8, 2016, Rules 43 to 45 (defining "solitary confinement" as "confinement of prisoners for 22 hours or more a day without meaningful human contact" and "[p]rolonged solitary confinement" as "a time period in excess of 15 consecutive days").

[22] Cited in *Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting); *Glossip v. Gross*, 135 S.Ct. 2726, 2767 (2015) (Breyer, J., dissenting).

followed by execution);[23] *Jagdish v. State of Madhya Pradesh*, [2009] INSC 1608, ¶ 12 (prolonged incarceration of those sentenced to death undermines the retributive and deterrent purposes of the death penalty); *Shatrughan Chauhan v. Union of India*, (2014) 3 S.C.C. 1, [2014] INSC 44, ¶ 43 (commuting 13 death sentences, and finding that "prolonged delay in execution of sentence of death has a dehumanizing effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence.").

- Singapore: *Jabar bin Kadermastan v. Pub. Prosecutor*, [1995] SGCA 18, [1995] 1 SLR(R) 326, ¶¶ 46, 63 (Singapore Court of Appeal: "[w]e accept that condemned prisoners on death row should not be subjected to a prolonged period of imprisonment;" "undue and unconscionable delay in the execution", not attributable to the convicted, may be unconstitutional).

CONCLUSION

International and foreign decisions and opinions confirm that it is cruel and unusual punishment and/or inhuman and degrading to execute prisoners who have been incarcerated for long periods of time under a death sentence. To do so causes mental anguish and physical hardships beyond the imposed sentence of death, and amounts to cruel and unusual

---

[23] Cited in *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting).

punishment, particularly when combined with extended periods of solitary confinement. The international and foreign legal consensus on this issue is instructive in interpreting the Eighth Amendment, in the circumstances of this case.

Amici respectfully urge the Supreme Court of the United States to consider the jurisprudence from the Privy Council, the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the U.N. Committee Against Torture, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Supreme Courts of Canada and India, all of which have concluded that execution after prolonged incarceration on death row is unconstitutional and/or contrary to international human rights norms.

These general principles of international and regional law, and the practice of other nations, are particularly compelling in the present case. The petitioner has been incarcerated for over 35 years, under a sentence of death, and for 14 years in solitary confinement. In these circumstances, executing Mr. Moore would be considered cruel and unusual punishment (or the equivalent legal standard) under the international, regional and national legal systems discussed herein.

For these reasons, *Amici* respectfully request this Court exercise its discretion in this case, and grant the petition for a writ of certiorari.

Respectfully submitted,

LUCY MARTINEZ
ANASTASIA DAVIS BONDARENKO
THREE CROWNS LLP
New Fetter Place
8-10 New Fetter Lane
London, EC4A1AZ
United Kingdom
+44 (203) 530-7959
lucy.martinez@
threecrownsllp.com

CONSTANCE DE LA VEGA
Counsel of Record
UNIVERSITY OF
SAN FRANCISCO
SCHOOL OF LAW
2130 Fulton Street
San Francisco, CA 94117
(415) 422-2296
delavega@usfca.edu

Counsel for Amici Curiae

January 19, 2016

APPENDIX

APPENDIX

Amici Organizations

The **Bar Human Rights Committee of England and Wales** (*BHRC*) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons*, 543 U.S. 551 (2005), and *Valle v. Florida*, 132 S. Ct. 1 (2011).

The **European Criminal Bar Association** (*ECBA*) is an association of independent specialist defence lawyers in all Council of European countries. As well as benefitting from professional networking and information exchange, ECBA Members are motivated to protect and resist where necessary any attempted diminution of defence rights. To this end, ECBA has collaborated in legal projects that seek to promote human rights in criminal proceedings. This has included work on strengthening the defence of death penalty cases in China, in collaboration with the European Initiative for Democracy and Human Rights. Through this project, ECBA developed professional networks between its members and members of the Beijing Bar Association in order to raise professional standards and help defend the rights of Chinese criminal defence lawyers. Other

ECBA projects promote the administration of justice and human rights under the rule of law around the world, and its Human Rights Officer represents the ECBA on related issues before the European Court of Human Rights including through activities such as trial observation.

Human Rights Advocates (*HRA*) is a California non-profit corporation founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for thirty years. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal laws. Cases it has participated in include: *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

The **Human Rights Institute** is the focal point of international human rights education, scholarship and practice at Columbia University's School of Law. Founded in 1998 by the late Professor Louis Henkin, the Institute supports and coordinates scholarship, expert research, and collaboration with outside individuals and advocacy groups on human rights issues in the United States and around the world, including research projects concerning the human rights implications of the death penalty. One of the core interests of the Institute is the strengthening of human rights in the United States. It focuses its work in this area on

scholarship, education, and outreach, as well as on participating in select litigation through *amicus curiae* briefs.

The **Human Rights Institute of the Paris Bar Association** (Institut des Droits de l'Homme du Barreau de Paris, *IDHBP*) was founded in 1978 by the President of the Paris Bar, under the joint aegis of UNESCO and the Paris Bar Association. From the outset, the mandate of the Institute has been human rights education, and specially the international law of human rights with lawyers and judges in France and in Europe. For some years, the Institute has been developing a policy of *amicus curiae* with the European Court of Human Rights (Cases: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application n° 45036/98, 30 June 2005; *Sergey Zolotukhin v. Russia*, Application n° 14939/03, 10 February 2009; *Makaratzis v. Greece*, Application n° 50385/99, 20 December 2004). The Institute and members have published numerous books and articles on the international law of human rights.

The **Human Rights League** (Ligue des Droits de l'Homme, *LdH*) was founded in 1898 to defend an innocent, Captain Dreyfus, a Jew wrongly convicted of treason. The organization is a free civic actor, independent from political parties, syndicates and associations, and seeks to be a citizen implicated in political life, participating in its debates. LdH seeks to fight injustice, racism, sexism, anti-Semitism, and all other forms of discrimination, focusing its work on social citizenship and proposals for measures that support and create a strong and living democracy in France and in Europe. LdH defends secularism against xenophobic manipulations, freedoms, equality

of rights and fraternity as the foundations of a more just and united society.

The **International Bar Association's Human Rights Institute** is an international body, headquartered in London, which helps promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide.

The **International Federation for Human Rights** (Fédération Internationale des ligues des Droits de l'Homme, *FIDH*) is an international human rights NGO federating 178 organizations from 120 countries. Founded in 1922, it is the oldest international human rights organization worldwide and works to defend all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights. FIDH acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. FIDH has published reports on the death penalty in Asia, Africa, and the Middle East.

The **National Bar Council** (Le Conseil National des Barreaux, *CNB*) was established by the Law of 31 December 1990 as a public interest organisation. It represents all lawyers practicing in France and registered with one of the 164 local bars. The main mission of the CNB is to represent the legal profession in France and abroad. It contributes to the development of legislation concerning lawyers and their conditions of practice in general and intervenes on all questions concerning the judiciary or legislative provisions on which the profession

decides to express an opinion. In addition to representing the profession, the CNB has the mission to unify the rules and usage concerning the profession of lawyers and ensures the professional training of lawyers. Apart from its institutional mission, the CNB has established internal commissions working on various issues, including the Commission Libertés et droits de l'Homme created in 1997. This Commission intervenes on the adoption and amendment of legislation concerning fundamental freedoms, particularly in the field of criminal law and procedure. The Commission also advocates for the creation of a specific Bar attached to the International Criminal Court and regularly intervenes on issues of international and European law.

The **Paris Bar** (Le Barreau de Paris) is the largest Bar in France and comprises 25,000 members. The Paris Bar is often approached when human rights are endangered around the world. In terms of defending human rights, the Paris Bar cooperates and exchanges information with numerous human rights organizations. The actions undertaken by the Paris Bar are particularly aimed at supporting lawyers in the freedom, independence and dignity of their profession. It also undertakes trial observations and advocacy on several issues. It has previously appeared as *amicus curiae* before courts in several jurisdictions.

***Amici* Individuals**

The **Honourable Louise Arbour C.C., G.O.Q.** is a jurist in residence at Borden Ladner Gervais LLP. Madam Arbour sat as a justice of the Supreme Court of Canada from 1999 to 2004, on the Court of Appeal

for Ontario and the Supreme Court of Ontario. She has held senior positions at the United Nations, including that of High Commissioner for Human Rights from 2004-2008. Madam Arbour served as Chief Prosecutor for The International Criminal Tribunals for the former Yugoslavia and for Rwanda, and is a member of the Advisory Board of the Coalition for the International Criminal Court. She chaired an inquiry commission that investigated certain events at the Prison for Women in Kingston, Ontario, and has also served as a member of the Global Commission on Elections, Democracy and Security.

Emeritus Professor Robert Badinter is a retired Professor of Law at the Sorbonne (Emeritus since 1996) and a former member of the Senate of France, where he held office as the President of the Ethics Committee. He was a member of the Paris Bar and a founding member of Badinter, Bredin et parteniares (today, Bredin Prat LLP). In 1981, he was appointed Minister of Justice, during which he led an intense action to promote civil liberties in French Justice, resulting in the abolition of the death penalty in France. From 1986 to 1991, Professor Badinter was appointed President of the Constitutional Council, before being appointed by the Council of Ministers of the European Community as President of the Arbitration Commission for the Former Yugoslavia from 1992 to 1995. In 2003, he was appointed by Secretary-General Kofi Annan to an Executive Committee on the reform of the United Nations. From 1995 until 2013, Professor Badinter served as President of the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe (OSCE). Throughout his academic and

professional career, Professor Badinter has authored various books and articles on the death penalty ("The Execution", Grasset 1973, Fayard 1998; "The Abolition", Fayard 2000; "Against Death Penalty", Fayard 2006).

Professor Brian Burdekin AO is currently Visiting Professor at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Sweden. He is also Professorial Visiting Fellow at the University of New South Wales Faculty of Law. Professor Burdekin is also International Adviser to a number of National Human Rights Institutions in Africa, Asia and Central and Eastern Europe. From 1995 to 2003, he was Special Adviser on National Institutions to the first three United Nations High Commissioners for Human Rights. During this time, he conducted over 200 missions to 55 countries in Africa, Asia, Europe and Latin America where governments or civil society wanted to create an independent Human Rights Commission. In the past 25 years, Professor Burdekin has helped to establish such Commissions in over 70 countries and is generally considered to be the leading international expert on the subject. Prior to his appointment with the United Nations, Professor Burdekin was, from 1986 to 1994, the first Federal Human Rights Commissioner of Australia. In this capacity, in 1990-91, he was one of the key figures involved in preparing the United Nations' principles prescribing the minimum standards for national human right institutions (the Paris Principles), which were subsequently adopted by the General Assembly. From 1978 to 1986 he was principal advisor to a former Australian Prime Minister, Deputy Prime Minister and Federal Attorney General. In June

1985, Professor Burdekin was made an Officer of the Order of Australia for his services to human rights both in Australia and other countries.

Professor David Caron is the Dean of The Dickson Poon School of Law, King's College London. He was previously the C. William Maxeiner Distinguished Professor of Law at the University of California at Berkeley. He currently serves as a member of various organisations including as member of the U.S. Department of State Advisory Committee on Public International Law, and member of the Board of Editors of the American Journal of International Law. He served as the President of the American Society of International Law from 2010 to 2012.

Professor Sarah H. Cleveland is the Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School. She is also the Faculty Co-Director of the Human Rights Institute. In 2014, she was nominated by the United States and elected to serve a four-year term as an independent expert on the UN Human Rights Committee. She is the Co-Coordinating Reporter of the American Law Institute's project on the *Restatement Fourth, Foreign Relations Law of the United States*, and the U.S. Member on the European Commission for Democracy through Law (Venice Commission) of the Council of Europe. From 2009-2011 she served as Counselor on International Law to the Legal Adviser of the U.S. Department of State, and she continues to serve as a member of the Secretary of State's Advisory Committee on International Law. She is a member of the Executive Council of the American Society of International Law, and a Council Member of the International Bar Association's Human Rights

Institute. She has published widely on issues relating to international human rights law and the use of international law in U.S. constitutional interpretation, including co-authoring *Human Rights* (2d. ed. 2009, with Louis Henkin and others), and Sarah H. Cleveland, *Our International Constitution,* 1 Yale J. Int'l L 31 (2006).

Mark George QC is an English-qualified criminal law barrister of more than 35 years call. He has been instructed in a number of serious criminal law cases and high-profile inquests and regularly acts as defence counsel in serious criminal trials. He is consistently recommended as a highly experienced criminal trial advocate. Mr. George has a strong interest in death penalty cases in the United States, stemming from a 1998 capital murder trial in Texas in which Mr. George assisted with preparation of the case for trial. Mr. George is a trustee of *Amicus,* an NGO set up to provide assistance to those practising in the field of capital defence in the USA. He helps to arrange internships for young lawyers to assist with US death penalty trials and appeals and regularly teaches on *Amicus* training courses across the UK. He has also written a number of articles for the *Amicus* Journal on aspects of US death penalty law. Mr. George has been involved with writing *amicus curiae* briefs in three US Supreme Court cases: on behalf of the Bar Human Rights Committee of England and Wales (*BHRC*) in *Graham v. Florida* concerning life without parole for those aged under 18; on behalf of the BHRC and Reprieve in the case of *Manuel Valle v. Florida* concerning an individual on death row for over 33 years; and on behalf of the BHRC in *Miller v. Alabama; Jackson v. Hobbs*

concerning sentencing of juveniles convicted of murder.

Professor Guy S. Goodwin-Gill is Emeritus Fellow of All Souls College, Oxford and Emeritus Professor of International Refugee Law in the University of Oxford. He is also a Barrister at Blackstone Chambers, London, where he practises in public international law generally, and in human rights, citizenship, refugee and asylum law. He is an Honorary Associate of the Refugee Studies Centre, Oxford, and an Honorary Senior Fellow of Melbourne Law School, University of Melbourne, and was a Visiting Professorial Fellow at the University of New South Wales. In the recent past, he has held the W. J. Ganshof van der Meersch Chair at the Université Libre de Bruxelles (2010), was Director of the Centre for Research and Studies at the Hague Academy of International Law (2010), Visiting Professor at the Geneva Academy of International Humanitarian Law and Human Rights from 2008-11, and Professor of Asylum Law at the University of Amsterdam (1994-99). He is the Founding Editor of the *International Journal of Refugee Law* (Oxford University Press) and was Editor-in-Chief from 1989-2001. Professor Goodwin-Gill has written extensively on international law issues, including treaty interpretation, refugees, migration, citizenship, statelessness, elections, and child soldiers.

Professor Carolyn Hoyle is Director of the Centre for Criminology at the University of Oxford. She has published empirical and theoretical research on a number of criminological topics including domestic violence, policing, restorative justice, the death penalty, and wrongful convictions. She is co-author of

the book *The Death Penalty: A Worldwide Perspective* (5th edn Oxford University Press 2015).

Professor Julian Killingley is Professor of American Public Law at Birmingham City University and a member of the Birmingham City University Centre for American Legal Studies. He has particular expertise in American criminal defence litigation, American constitutional law and the death penalty in America. Professor Killingley is the Director of the Academic Panel of *Amicus*, an NGO set up to provide assistance to those practising in the field of capital defence in the USA. Professor Killingley has written a number of published articles and book chapters on aspects of US death penalty law. He has also authored numerous *amicus curiae* and Writ of Certiorari briefs filed in the US Supreme Court and Federal District Courts on the law governing the death penalty and punishment of juvenile offenders: on behalf of Amnesty International *et al* in *Graham v. Florida* concerning life without parole for those aged under 18; on behalf of the Bar Human Rights Committee of England and Wales (*BHRC*) in *Deck v. Missouri* concerning the human rights implications of shackling a defendant in the sentencing phase of a capital trial; and on behalf of the BHRC and the International Human Rights Committee of the Law Society of England and Wales in *Roper v. Simmons*, concerning the sentencing of a juvenile defendant to death.

Professor Robert McCorquodale is the Director of the British Institute of International and Comparative Law. He is also a Professor of International Law and Human Rights at the University of Nottingham and a barrister at Brick Court Chambers in London. He has published widely

on public international law and human rights, provided advice and training on public international law around the world, and is the Co-General Editor of BIICL's major publication: the International and Comparative Law Quarterly.

Professor Juan Méndez was appointed the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment on 1 November 2010. He was previously the Co-Chair of the International Bar Association's Human Rights Institute from 2010-2011, the President of the International Center for Transitional Justice until May 2009, and the Special Advisor on the Prevention of Genocide to Kofi Annan between 2004 and 2007. He is currently a Professor of Human Rights Law in Residence at the American University and has taught International Human Rights Law at Georgetown Law School and the Oxford Masters Program in the United Kingdom. He has received several human rights awards including the Goler T. Butcher Medal from the American Society of International Law (2010) and a Doctorate Honoris Causa from the University of Quebec in Montreal (2006).

Geoffrey Robertson QC is the founder and joint head of Doughty Street Chambers, a leading human rights chambers in the UK. He has had a distinguished career as a trial and appellate counsel, an international judge, and author of leading textbooks, including "*Crimes Against Humanity – The Struggle for Global Justice*", published in the US by the New Press. He won a silver gavel from the American Bar Association for his book "*The Tyrannicide Brief*" and received the 2011 New York Bar Association award for distinction in international law and affairs. He is a Master of the Middle Temple.

He has argued many landmark cases in media, constitutional and criminal law, in the European Court of Justice; the European Court of Human Rights; the Supreme Court (House of Lords and Privy Council); the UN War Crimes courts; the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and in the highest courts of many commonwealth countries. He was counsel for the appellants in *Pratt v. Attorney-General for Jamaica*.

Emeritus Professor Sir Nigel Rodley KBE, is Emeritus Professor of Law and Chair of the Human Rights Centre at the University of Essex. He is a member of the United Nations Human Rights Committee. In March 1993, Sir Rodley was designated Special Rapporteur on Torture by the UN Commission on Human Rights, serving in this capacity until 2001. Since 2001 he has been a member of the UN Human Rights Committee, a position to which he has been re-elected three times by the States Parties to the International Covenant on Civil and Political Rights (as the UK's nominated candidate). He was awarded a KBE in the 1998/99 New Year's Honours List, "for services to human rights and international law". In 2005 he was joint recipient of the American Society of International Law's Goler T. Butcher medal for "outstanding contributions to ... international human rights law".

Professor William Schabas is Professor of International Law at Middlesex University in London. He currently holds positions at Leiden University, National University of Ireland Galway, Paris School of International Affairs (Sciences Politiques), Chinese Academy of Social Sciences in Beijing, Kellogg College of the University of Oxford, Northumbria

University, and the Université du Québec à Montréal. He is the author of more than twenty books on international human rights law, including *The Universal Declaration of Human Rights: travaux préparatoires* (Cambridge University Press, 2013), *Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011), *Genocide in International Law* (Cambridge University Press, 2nd ed, 2009) and *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 3rd ed, 2003). He has also published more than 350 articles in academic journals, principally in the field of international human rights law and international criminal law. Professor Schabas has worked as a consultant on capital punishment for the United Nations Office of Drugs and Crime, and drafted the 2010 and 2015 reports of the Secretary-General on the status of the death penalty.

Professor Theo van Boven is Honorary Professor of International Law at the International & European Law Department, Maastricht University. From December 2001 to December 2004, Professor van Boven was UN Special Rapporteur against Torture. Earlier, he served as Director of Human Rights of the United Nations and was a member of the United Nations Sub-Commission for the Promotion and Protection of Human Rights and of the Committee on the Elimination of Racism and Discrimination. He was also a visiting professor at Harvard Law School (1987) and at New York University Law School (1990), and has written extensively on international human rights and humanitarian law.

Dr Philippa Webb is Reader (Associate Professor) in Public International Law. Dr Webb served as the

Special Assistant and Legal Officer to Judge Rosalyn Higgins during her Presidency of the International Court of Justice (2006-2009) and, prior to that, as the Judicial Clerk to Judges Higgins and Owada (2004-2005). She was also the Associate Legal Adviser to Prosecutor Luis Moreno-Ocampo at the International Criminal Court (2005-2006). Dr Webb is on the International Advisory Panel for the American Law Institute's project *Restatement Fourth, Foreign Relations Law of the United States*.

Supreme Court, U.S.
FILED
JAN 19 2016
THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF INTERNATIONAL ORGANIZATIONS INTERESTED IN MEDICAL EXPERTISE, PSYCHIATRY AND CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PAUL HESSLER
Counsel of Record
LINKLATERS LLP
1345 Avenue of the Americas
New York, NY 10105
(212) 903-9132
paul.hessler@linklaters.com
Counsel for Amici Curiae

January 19, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Amici Curiae

Amnesty International Limited

British Medical Association

Irish Mental Health Lawyers Association

Mental Health Foundation

The Royal College of Psychiatrists

The Swedish Section of the International Commission of Jurists

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	4
ARGUMENT	6
1. *England*	8
2. *Canada*	10
3. *Australia*	10
4. *New Zealand*	11
5. *European Court of Human Rights (the "ECtHR")*	12
6. *Singapore*	13
7. *Sweden*	14
8. *Germany*	15
9. *Japan*	16
10. *Ireland*	16
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page(s)

Atkins v. Virginia, 536 U.S. 304 (2002) 4

Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex parte Moore, 470 S.W.3d 481 (Tex. Crim. App. 2015) 5, 7

Glossip v. Gross, 135 S.Ct. 2726 (2015) 6

Roper v. Simmons, 543 U.S. 551 (2005) 6

Thompson v. Oklahoma, 487 U.S. 815 (1988) 6

CONSTITUTION

U.S. Const. amend. VIII 5, 6

FOREIGN CASES

Bull v. Fulton (1942) 66 C.L.R. 295 (Austl.) 11

Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 2004, 2 StR 367/04, BGHSt 49, 347 (Ger.) 15

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 8, 2006, BvR 578/02, 2 BvR 796/02, BVerfGE 117, 71 (Ger.) 16

Burgess v. Leech, (2007) NSWSC 700 (July 19, 2007) (Austl.) 11

Henderson v. R [2010] EWCA (Crim) 1269, [2010] 2 Cr. App. (Eng.) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Hutchison Reid v. United Kingdom, 2003-IV Eur. Ct. H.R. 1 (ECtHR) 13

Khoo James v. Gunapathy (2002) 1 SLR(R) 1024 (Sing.) 14

People (DPP) v. Kelly, [2008] 3 I.R. 697 (Ir.) 16

R v. Harris [2005] EWCA (Crim) 1980, [2006], 1 Cr. App. R. 5 (Eng.) 9

R v. Holdsworth [2008] EWCA (Crim) 971 (Eng.) 8

R v. P [2010] EWCA (Crim) 2895 (Eng.) 10

R. v. Trochym, [2007] 1 S.C.R 239 (Can.) 10

R. v. J.-L.J., [2000] 2 S.C.R 600 (Can.) 10

Rakevich v. Russia, App. No. 58973/00 (Eur. Ct. H.R. Oct. 28, 2003) (HUDOC), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61414 (ECtHR) 13

Saikō Saibansho [Sup. Ct.] Jul. 17, 2000, SAIKO SAIBANSHO KEIJI HANREISHU [KEISHŪ] (Japan) 16

Shepard v. R [2011] NZCA 666, [2012] 2 N.Z.L.R 609 (C.A.) (N.Z.) 12

SR v. R, [2011] NZCA 409, [2011] 3 N.Z.L.R. 638 (C.A.) (N.Z.) 11, 12

Timbury v. Coffee (1941) 66 C.L.R. 277 (Austl.) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Winterwerp v. Netherlands, App. No. 6301/73, 2 Eur. H. R. Rep. 387 (1979) (ECtHR) 13

FOREIGN STATUTES

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, 2003 S.N.Z. No. 116, § 7(1) (N.Z.) 12

INTERNATIONAL CONVENTIONS

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5 ..... 12, 13

OTHER AUTHORITIES

Axel Boetticher et al., *Mindestanforderungen für Prognosegutachten [Minimum requirements for prediction expert opinions]*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] [New Journal of Criminal Law] (2006) (Ger.) 15

Martin Borgeke, *Att bestämma påföljd för brott* (Norstedts Juridik AB, Stockholm, 2 uppl. 2012) [book] (Swed.) 14

Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen* [Penal Code] (63d ed. 2016) (Ger.) 15

Inspektionen för vård och omsorg [Health and Social Care Inspectorate] (Swed.) *available at* http://www.ivo.se (last visited Jan. 14, 2016) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Declan McGrath, *Evidence* (2d ed., 2015) (Ir.) 16

John Frederick Archbold, *Archbold: Criminal Pleading, Evidence and Practice* (P.J. Richardson ed., 1st Sup, 64th ed, Sweet & Maxwell 2016) (Eng.)... 9

Socialstyrelsens författningssamling [SOSFS] 1996:14, *Rättspsykiatrisk undersökning* [official publications by governmental department], (Swed.) 14

Socialstyrelsens information om diagnostiseringskoder [National Board of Health and Welfare's information converning diagnostic codes] (Swed.), *available at* http://www.socialstyrlsen.se/klassificeringochkoder/diagnoskodericd (last visited Jan. 14, 2016)..... 15

STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37, *Amici* respectfully submit this brief *amicus curiae* in support of Petitioner.[1]

Amici are organizations, associations, institutes and foundations interested in medical expertise, psychiatry and/or the promotion of criminal justice and protection of human rights.

AMNESTY INTERNATIONAL LIMITED ("AI Ltd.") is a non-governmental organization, registered in England, which operates as the headquarters for the global movement, Amnesty International ("AI"). Founded in 1961, AI currently comprises a global movement of 68 entities and over 2.8 million individual supporters, and is independent of any government, political ideology, economic interest or religion. The AI movement campaigns for the promotion of the respect for, the development of, and the progressive realization of, international human rights law and international humanitarian law. Its work is predicated on international rules and principles reflected in diverse norms of human rights, including treaties, general principles of international law, and rules of customary international law. AI also undertakes research and advocacy activities high-

---

[1] Pursuant to Rule 37.2, Counsel of record for all listed parties have received timely notice of intent to file this brief and have consented to filing. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, its members or its counsel made a monetary contribution to its preparation or submission.

lighting violations, and advocating for justice, truth, reparation and guarantees of non-recurrence for victims of human rights violations.

BRITISH MEDICAL ASSOCIATION ("*BMA*"), founded in 1832, is the trade union and professional body for doctors in the United Kingdom. The association was initially established to create a "friendly and scientific" forum where doctors could advance and exchange medical knowledge. Following its transition into the BMA in 1855, its role expanded to become a professional body representing all medical practitioners. In this role, the BMA works with governments to lobby for improvements to health and health care, and in addition it has established a research and publishing arm (for instance through its weekly journal, the British Medical Journal), in order to lead debate on key ethical, scientific and public health matters. Research conducted by the BMA often feeds into the development of new policy.

IRISH MENTAL HEALTH LAWYERS ASSOCIATION ("*IMHLA*"), founded in 2007, is a membership composed of solicitors on the Mental Health Commission's legal representative panel and Mental Health Legal Practitioners and academics specializing in the area of mental health law. In addition to participating in the discussion on developments in the area of mental health law, the IMHLA also aims to encourage and maintain the highest standard of preparation, representation and practice in relation to mental health law. The IMHLA has previously made submissions to the Mental Health Commission in Ireland and to the government to challenge and clarify various aspects of proposed mental health legislation.

MENTAL HEALTH FOUNDATION, founded in 1949, works in the United Kingdom directly with people with mental health problems, learning disabilities and dementia, their families and services to help put policy into practice, carry out research and development work and influence national and local policy.

THE ROYAL COLLEGE OF PSYCHIATRISTS (*"RCPsych"*), founded in 1841, is an independent professional membership organization, representing over 15,000 psychiatrists in the United Kingdom and internationally. The core purposes of the RCPsych are to set standards and promote excellence in psychiatry and mental healthcare; to lead, represent and support psychiatrists; and to work with patients, care-givers and other organizations interested in delivering high quality mental health services.

As a professional body, the RCPsych has a vital role in representing the expertise of the psychiatric profession to governments and other agencies. Public education is a core aspect of the RCPsych's activities; examples of its publications include the British Journal of Psychiatry, the BJPsych Bulletin, BJPsych Advances, Evidence-Based Mental Health, BJPsych Open and BJPsych International. Part of the RCP's mission is to improve the scientific understanding of mental illness.

THE SWEDISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (*"ICJ-Sweden"*) was created shortly after the establishment of the Geneva-based International Commission of Jurists ("ICJ") in 1952. Globally, the ICJ consists of 60 jurists, whose achievements in the human rights field have gained wide international recognition. The ICJ monitors and reports infringements of human rights.

ICJ-Sweden seeks to support the secretariat in Geneva, and works to promote human rights and the rule of law principles in Sweden and internationally, primarily by ensuring compliance with Sweden's international and regional human rights obligations. Its work is carried out through petitions, organizing debates and seminars as well as extensive publishing to voice opinions and participate in the legislative process.

STATEMENT OF THE CASE

Amici adopt the statement of facts in the Petition for Writ of Certiorari filed by Bobby James Moore and files this *amicus curiae* brief on behalf of Petitioner.

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals' ("CCA") deliberate application to Mr. Moore of an outdated definition of intellectual disability is contrary to the way in which numerous non-U.S. jurisdictions[2] (the "Non-U.S. Jurisdictions") apply medical standards in the determination of a person's medical condition and the resolution of disputes. The CCA held that "[b]ecause our legislature has not enacted legislation to implement *Atkins's* mandate, we continue to follow

---

[2] Australia, Bangladesh, Belgium, Canada, Court of Justice of the European Union, European Court of Human Rights, England, France, Germany, Hong Kong, India, International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Ireland, Italy, Japan, Myanmar, New Zealand, Papua New Guinea, Pakistan, Poland, Portugal, Russia, Singapore, South Africa, South Korea, Spain and Sweden.

the AAMR's[3] 1992 definition of intellectual disability that we adopted in [*Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)] for *Atkins* claims presented in Texas death-penalty cases." *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015). Despite the fact that the AAMR's definition of intellectual disability was updated in 2010 to align with advances in medical knowledge, the CCA nevertheless concluded that "at this juncture, the legal test we established in *Briseno* remains adequately 'informed by the medical community's diagnostic framework'". *Id.* at 487.

Medical standards are routinely used in many jurisdictions worldwide, particularly in the evaluation of expert medical evidence and in the resolution of legal disputes. However, Counsel's review of the jurisprudence on the application of medical standards in Non-US Jurisdictions did not reveal any instances of a statute requiring the application of, or a court in such jurisdictions applying (deliberately or otherwise), medical standards, tests or guidelines which the medical community generally accepted were out-of-date, nor any decisions suggesting that it would be appropriate to do so.[4]

---

[3] The American Association on Mental Retardation ("AAMR") changed its name in 2007 and is now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD").

[4] With the obvious, and irrelevant, exception of the field of medical negligence where liability is necessarily assessed against the professional standards that prevailed at the time the liability arose (but not against a standard that had been superseded at the time the liability arose).

U.S. law and practice has, on occasion, been informed by the laws and jurisprudence of other countries and the international community, including in the context of the Court's Eighth Amendment jurisprudence.[5] On the basis of the propositions espoused in the statutes and case law identified in this brief, and given the facts of this case, the Court should consider the patent unreasonableness of the CCA's application of the outdated *Briseno* test in Mr. Moore's case.

ARGUMENT

Contrary to the decision by the CCA, Counsel's review of the statutes, case law and procedural guidelines of the Non-U.S. Jurisdictions (which include both civil law and common law jurisdictions)[6] did not reveal any instance in which a medical standard that was no longer the prevailing view of the relevant medical community was applied in the resolution of a disputed issue. Indeed, Counsel's review has not identified any statutes, case law or

---

[5] *See, e.g., Glossip v. Gross*, 135 S.Ct. 2726, 2775-76 (2015) (Breyer, J., dissenting) (noting position on use of death penalty in foreign jurisdictions); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (noting "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishment'"); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (noting "[the Court has] previously recognized the relevance of the views of the international community" in determining whether a punishment is cruel and unusual).

[6] The statutes and case law of many of the Non-U.S. Jurisdictions do not provide guidance specifically in the context of capital punishment, because many of them do not have capital punishment or do not actively use it.

procedural guidelines which permit judicial disregard of widely accepted developments in medical knowledge in preference for abandoned medical standards.[7] The reasons for this are obvious. Any court or system of justice that applies abandoned medical standards will, at a minimum, suffer a significant loss of credibility, thereby undermining public respect for the judicial process and the rule of law. The wider implications of such an approach would be very disturbing indeed, not least in cases such as this which involve the application of the death penalty.

Moreover, although it is generally considered self-evident (and not worthy of discussion) in several Non-U.S. Jurisdictions that a court should not apply an outdated medical standard, numerous examples of statutes and cases demonstrate that the courts of certain Non-U.S. Jurisdictions are expressly required not to, or are not bound to, apply medical standards abandoned by the medical community.

Counsel's review of the jurisprudence of the Non-U.S. Jurisdictions indicates that the strength and reliability of expert medical evidence commonly depends, among other things, on the extent to which it is based on generally accepted medical standards in the relevant field or widely recognized guidelines and protocols. In this case, it is telling that the CCA did not provide a basis for its assertion that the medical standard adopted in *Briseno* "remains adequately 'informed by the medical community's diagnostic framework'". *Ex parte Moore*, 470 S.W.3d at 487. No such basis grounded in medical science

---

[7] Again, with the obvious, and irrelevant, exception of the field of medical negligence.

could be provided because none exists; indeed, the CCA recognized that the medical community's diagnostic framework in respect of intellectual disability has moved on since the 1992 standard adopted in *Briseno*. *See id.* at 486 – 87.

Further, in choosing to adopt a medical standard that no longer represents the prevailing view of the relevant medical community, the CCA elevated a medical standard to the level of a legal proposition that is governed by the doctrine of precedent. Not only is this erroneous, it is also contrary to the approach taken in other common law jurisdictions that also adhere to the doctrine of precedent.

In summary, the CCA's application of the now abandoned medical standard adopted in *Briseno* is wholly at odds with the relevant statutes, procedural guidelines and case law of a number of Non-U.S. Jurisdictions, as demonstrated by the following jurisprudence, and is not supported by the jurisprudence of any of the Non-U.S. Jurisdictions.

1. England

The English Court of Appeal (the second highest appellate court in England) has recognized that medical and scientific knowledge continue to evolve, and as such, "[a]s knowledge increases, today's orthodoxy may become tomorrow's outdated learning." *R v. Holdsworth* [2008] EWCA (Crim) 971, [57]. Courts should thus only apply medical standards that represent the prevailing view of the medical community.

In this regard, in a leading recent case on the issue of medical evidence, England's Court of Appeal held that prior appellate jurisprudence does not provide

authority for a medical proposition and that the English courts are required to make decisions as to the application of medical standards based on an assessment of the evidence before them. *See Henderson v. R* [2010] EWCA (Crim) 1269, [6], 2 Cr. App. 24; John Frederick Archbold, *Archbold: Criminal Pleading, Evidence and Practice* paras 10-49 (P.J. Richardson ed., 1st sup, 64th ed, Sweet & Maxwell 2016). The Court in *Henderson* noted that:

> It is trite to observe that the conclusion of any court as to the medical evidence, whether at first instance or on appeal, is dependent upon the evidence before that court. No appellate jurisprudence could provide authority for a medical proposition... Previous legal authority cannot determine whether the conclusion of a medical report should be accepted or rejected. The most legal authority can do is present an accurate record of what was or was not accepted or propounded.

Henderson v. R [2010] EWCA (Crim) 1269 [6], [2010] 2 Cr. App. 24.[8]

---

[8] The Court of Appeal further found that it was inappropriate to adhere to the medical standard adopted in *R v. Harris*, which was another decision of the same court from 2005. *See Henderson v. R* at [6]. The Court explained that:

> The strength of a proposition in medicine depends upon the strength of the medical evidence on which it is based. The quality and extent of the evidence will inevitably vary from case to case. Whilst it is now commonly accepted that the triad [the "triad" refers to a previously accepted hypothesis with respect to shaken baby syndrome which depended on findings of a triad of intracranial injuries in infants. *See R v. Harris* [2005] EWCA (Crim) 1980, [56], [2006] 1 Cr.

2. Canada

The Supreme Court of Canada (the highest court in Canada) recognizes that medical and scientific knowledge is not frozen in time, but may evolve based on improvements to existing bases of knowledge. *See, e.g., R. v. Trochym*, [2007] 1 S.C.R. 239, [31]; *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, [34]. The Supreme Court held that "even if [a technique or science] has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted in evidence without first confirming the validity of those assumptions." *R v. Trochym* at [32]. Thus, in Canadian cases, a medical standard which was accepted into evidence in a past case may subsequently be found to be inadmissible due to the later invalidity of its underlying assumptions that once may have been considered valid.

3. Australia

The High Court of Australia (the highest Court in Australia) held that Australian courts are not bound by previously accepted medical evidence in the face of contrary medical standards and knowledge that

---

App. 5], is strong evidence of shaking [contrary to the approach adopted in *R v. Harris*], that depends upon the common acceptance of experts in the field and not upon the conclusion of courts which are only able to weigh the evidence presented before them. *See id.* at [6].

The Court of Appeal in *R v. P* cited *Henderson* approvingly and noted that a "judgment constitutes legal and not medical authority." *R v. P* [2010] EWCA (Crim) 2895, [21], [31]. In England, the doctrine of precedent thus does not bind a court to follow a medical standard that has been abandoned by the medical community, or, indeed, any medical standard applied in an earlier case.

prevail in the medical community. *See, e.g.*, *Timbury v. Coffee* (1941) 66 C.L.R. 277; *Bull v. Fulton* (1942) 66 C.L.R. 295. The High Court set forth this principle over seventy years ago in *Timbury v. Coffee*. In the context of determining whether the testator lacked testamentary capacity by reason of insane delusions, the Court held that it was "not bound to go on applying views held over a century ago about mental disturbance and insanity and to disregard modern knowledge and understanding of such conditions". *Timbury v. Coffee* at 284. The High Court emphasized this principle a year later in *Bull v. Fulton*, finding that "it must be remembered... that some statements in [older judgments regarding mental diseases] are based on [then] current medical knowledge and that more is known about mental diseases now than then." *Bull v. Fulton* at 339.

The High Court's view in *Coffee* was followed as recently as 2010 by the Supreme Court of New South Wales, in which the Supreme Court observed that "many reported cases contain judicial expositions of competency, and references in them to insanity, mental illness and delusions reflect the understanding of judges and in turn, medical opinion which changes from age to age." *Burgess v. Leech*, [2007] NSWSC (July 19, 2007), [22-25]. Australia has thus explicitly recognized that medical knowledge evolves and courts are therefore not bound to apply medical standards which were relied on in previous cases when faced with updated standards based on current knowledge.

4. New Zealand

The Court of Appeal of New Zealand (an appellate court), in the case of *SR v. R*, accepted that a trial

court was entitled to prefer the evidence of an expert who had used the most recent version of an intelligence scale in assessing the accused's intelligence over the evidence of an expert who had used an outdated version. *See SR v. R*, [2011] NZCA 409, [2011] 3 N.Z.L.R. 638 (C.A.). The Court of Appeal agreed with the trial judge that the use of an outdated version of the relevant intelligence scale by an expert giving evidence in the trial "cast immediate doubt on the validity of the assessment made by [that expert]". *See id.* at [148].

The New Zealand Court of Appeal has also emphasized the need for scientific experts to follow "recognised guidelines or protocols" in giving expert opinion evidence. *See Shepard v. R* [2011] NZCA 666, [2012] 2 N.Z.L.R. 609 (C.A.) at [112]. That proposition is recognized in New Zealand's Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, which defines "intellectual disability" by reference to tests "generally used by clinicians" for measurement of deficits in adaptive functioning. *See* Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 7(1).

5. European Court of Human Rights (the "ECtHR")

In a leading case on the detention of persons of "unsound mind" under Article 5(1)(e) of the European Convention on Human Rights,[9] the ECtHR

---

[9] Article 5(1)(e) of the European Convention on Human Rights provides: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (e) the lawful detention ... of persons of unsound mind...". European Convention for the Protection of

acknowledged that psychiatric knowledge does not stand still. *See Winterwerp v. Netherlands*, App. No. 6301/73, 2 Eur. H. R. Rep. 387 (1979). In *Winterwerp v. Netherlands*, the ECtHR held that the term "'persons of unsound mind'" as used in the Convention is "not [a term] that can be given a definitive interpretation...[its meaning] is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes." *See id.*, at 401.

This principle set out in *Winterwerp* was relied on by the ECtHR in *Hutchison Reid v. United Kingdom*, in which the court recognized that the grounds on which detention may be ordered under domestic law may change during a lengthy period of confinement, given that "considerable time has elapsed and medical, psychiatric and legal developments have, inevitably, occurred". *Hutchison Reid v. United Kingdom*, 2003-IV Eur. Ct. H.R. 1, 20. The ECtHR further acknowledged in *Rakevich v. Russia*, citing *Winterwerp*, that "psychiatry is an evolving field, both medically and in social attitudes". *Rakevich v. Russia*, App. No. 58973/00, [30] (Eur. Ct. H.R. Oct. 28, 2003) (HUDOC), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61414.

6. Singapore

The Singapore courts recognize that medical standards do not stand still, but rather must be considered in the light of advances in medical facts or

---

Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5.

knowledge. *See, e.g., Khoo James v. Gunapathy* (2002) 1 SLR(R) 1024. In the context of evaluating the standard of care expected of medical practitioners, the Court of Appeal (Singapore's highest court) held that an expert view, in order to qualify as representative of a responsible body of medical opinion, should not ignore or controvert known medical facts or advances in medical standards, noting "[t]he expert's opinion does not stand *in vacuo*. An advancement in medical science, or a known medical fact which is patently ignored, are extrinsic facts which can nevertheless render a body of opinion illogical." *See id.* at [66].

7. Sweden

In Swedish courts, experts preparing psychiatric opinions are required to use standards set out in classification systems such as the ICD-10 (International Statistical Classification of Diseases and Related Health Problems) developed by the World Health Organization, and the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders) created by the American Psychological Association. *See* § 4.3 Socialstyrelsensförfattningssamling [SOSFS] 1996:14 Rättspsykiatrisk undersökning, [official publications by governmental department] (Swed.); Martin Borgeke, *Att bestämma påföljd för brott*, 310-312 (Norstedts Juridik AB, Stockholm, 2 uppl. 2012) [Book] (Swed.).

Such standards regularly undergo revisions and once such standards are translated and implemented, the new standards are applied by experts in Sweden. If the up-to-date standards are not complied with, a remark or ordinance may be imposed by the Health and Social Care Inspectorate. *See* Socialstyrelsens

information om diagnostiseringskoder [National Board of Health and Welfare's information concerning diagnostic codes] (Swed.) *available at* http://www.socialstyrlsen.se/klassificeringochkoder/diagnoskodericd (last visited Jan. 14, 2016); Inspektionen för vård och omsorg [Health and Social Care Inspectorate] (Swed.) *available at* http://www.ivo.se (last visited Jan. 14, 2016).

8. Germany

In Germany, an expert opinion used in courts is required to meet "approved scientific requirements" (*"anerkannten fachwissenschaftlichen Anforderungen"*) and has to be prepared in accordance with the "actual scientific state of knowledge" (*"aktueller wissenschaftlicher Kenntnisstand"*). *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 2004, 2 StR 367/04, BGHSt 49, 347, 352; *see also* Axel Boetticher et al., *Mindestanforderungen für Prognosegutachten [Minimum requirements for prediction expert opinions]*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] [New Journal of Criminal Law] 537, 539 (2006); Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen* [Penal Code] (63d ed. 2016), sec. 20, para. 64b.

In practice, forensic experts in Germany use the established classification systems common in forensic psychology at the time they conduct their evaluations, rather than outdated standards. For example, in the context of proceedings to determine whether a life imprisonment sentence should be suspended, the Federal Constitutional Court has noted that a "medical expert opinion has to fulfil approved scientific standards". *See* Bundesverfassungsgericht [BVerfG] [Federal

Constitutional Court], Nov. 8, 2006, 2 BvR 578/02, 2 BvR 796/02, BVerfGE 117, 71, 105.

9. Japan

The Supreme Court of Japan (the highest court in Japan) stated that when assessing the value of an expert opinion as evidence, such assessment should "tak[e] into account new findings and others from scientific and technological developments in later years as well." *See* Saikō Saibansho [Sup. Ct.] Jul. 17, 2000, 54/6 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 550.

10. Ireland

The leading textbook on evidence law in Ireland provides that in evaluating expert opinions, Irish courts will consider whether the views or methodology of an expert accord with those generally accepted in his or her field of expertise. Declan McGrath, *Evidence* 416 (2d ed. 2015); *People (DPP) v. Kelly* [2008] 3 IR 697.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

PAUL HESSLER
Counsel of Record
LINKLATERS LLP
1345 Avenue of the Americas
New York, NY 10105
(212) 903-9132
paul.hessler@linklaters.com

January 19, 2016

Counsel for Amici Curiae

Supreme Court, U.S.
FILED
JAN 19 2016
OFFICE OF THE CLERK

No. 15-797

In The Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF *AMICI CURIAE* OF THE NATIONAL RELIGIOUS CAMPAIGN AGAINST TORTURE, REPRIEVE US, AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITIONER

Eric L. Lewis
Counsel of Record
Jeffrey D. Robinson
Esther Yong
LEWIS BAACH PLLC
1899 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20006
(202) 833-8900
eric.lewis@lewisbaach.com

Counsel for Amici Curiae

Dated: January 19, 2016

THE LEX GROUP DC ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. TDCJ Death Row Plan Imposes Prolonged, Indefinite Solitary Confinement on Petitioner and Others Sentenced to Death with No Security Justification 6

II. Prolonged, Indefinite Solitary Confinement, like Petitioner's Pursuant to the TDCJ Death Row Plan, Has Profound, Devastating Impacts on the Mental and Physical Health of Prisoners 9

III. International Human Rights Organizations and Courts Have Found that Prolonged, Indefinite Solitary Confinement, like Petitioner's Pursuant to the TDCJ Death Row Plan, Constitutes Torture 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES

Davis v. Ayala,
___ U.S. ___, 135 S. Ct. 2187 (2015) 10

In re Medley,
134 U.S. 160 (1890) 5, 10

Wilkinson v. Austin,
545 U.S. 209 (2005) 4

INTERNATIONAL CASES

Babar Ahmad and Others v. United Kingdom,
Eur. Ct. H.R. App. Nos. 24027/07 et al., 52 I.L.M. 443, 2013 WL 5785362 (Apr. 10, 2012) 18

Bámaca Velásquez v. Guatemala,
Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000) 18

Iorgov v. Bulgaria,
Eur. Ct. H.R. App. No. 40653/98 (Mar. 11, 2004) 20

Kennedy v. Trinidad and Tobago,
Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998 (Mar. 26, 2002) 19

Maritza Urrutia v. Guatemala,
Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003) 18

Mathew v. Netherlands,
2005-IX Eur. Ct. H.R. 57 (Sept. 29, 2005) 20

Mukong v. Cameroon,
Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (Aug. 10, 1994) 19

Polay Campos v. Peru,
Communication No. 577/1994, U.N. Doc. CCPR/C/61/D/577/1994 (Nov 5, 1997) 20

Sobhraj v. Nepal,
Communication No. 1870/2009, U.N. Doc. CCPR/C/99/D/1870/2009 (July 27, 2010) 19

Velásquez-Rodríguez v. Honduras,
Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 21, 1988) 21

Xavier Evans v. Trinidad and Tobago,
Communication No. 908/2000, U.N. Doc. CCPR/C/77/D/908/2000 (Mar. 21, 2003) 19

Yong-Joo Kang,
Communication No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999 (July 15, 2003) 19

CONSTITUTIONAL PROVISION

U.S. CONST. amend. VIII 4, 9, 21, 22

RULES

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIAL

Solitary Confinement on Texas Death Row: Submission from American Civil Liberties Union of Texas, Texas Civil Rights Project, and Texas Defender Service, Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before S. Judiciary Subcomm. on Constitution, Civil Rights & Human Rights, 113th Cong. (2014) 7

TREATIES

International Covenant for Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) 17

INTERNATIONAL AUTHORITIES

Sharon Shalev, *Chapter 5: Solitary Confinement as a Prison Health Issue, in* PRISONS AND HEALTH 27 (World Health Organization, 2014).....12

U.N. Rep. of the Human Rights Comm., General Comment No. 20 (44) (art. 7), U.N. Doc. A/47/40, annex VI, sec. A, at 193, GAOR, 47th Sess., Supp. No. 40 (1992) 17

U.N. Special Rapporteur of the Human Rights Council, Interim Rep. on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/66/268 (Aug. 5, 2011).....17

U.N. Special Rapporteur of the Human Rights Council, Interim Rep. on torture and other cruel, inhuman or degrading treatment or punishment, Annex, 25 U.N. Doc. A/63/175 (July 28, 2008) 18

SCIENTIFIC AUTHORITIES

Mark D. Cunningham & Mark P Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. L. 191 (2002) 9

Mark D. Cunningham et al., *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 Behav. Sci. L. 307 (2005) 9

Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. Abnormal Psychol. 54 (1972) 13

Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol'y 325 (2006) 11, 13

Craig Haney. *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49(1) Crime and Delinquency 124 (2003) 11

Istanbul Statement on the Use and Effects of Solitary Confinement, 18 Torture, no. 1, 2008 18

Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry and L. 104 (2010) 11, 16

Sharon Shalev, *A Sourcebook on Solitary Confinement*, Section 2.3, The negative health effects of solitary confinement: reported symptoms (Mannheim Centre for Criminology, London School of Economics and Political Science, 2008) 12, 13

Elizabeth A. Wilson, *Beyond the Rack: Post-Enlightenment Torture*, 39 New Eng. J. on Crim. & Civ. Confinement 41 (2013) 13

ADDITIONAL AUTHORITIES

Atul Gawande, *Hellhole: Is Long-Term Solitary Confinement Torture?*, The New Yorker, Mar. 30, 2009 ..... 13, 14, 16

Alex Hannaford, *Letters from Death Row: Alone on the Inside*, Tex. Observer, Mar. 16, 2015 7

David Mann, *Solitary Men*, Tex. Observer, Nov. 10, 2010 ..... 7, 8

John McCain, Faith of My Fathers (2000) 14

Scott Parks, *Report on 1998 escape led to shake-up at prison; Response may offer clues to what's in store in Connally case*, Dallas Morning News, Jan. 12, 2001 8

Texas Department of Criminal Justice, Death Row Plan 6, 7, 8

Christopher Zoukis, *Texas Prison Guard Union Urges Death Row Reforms*, Prison Legal News, Oct. 2015 7

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici[1] are United States based non-profits dedicated to securing human rights for underrepresented and marginalized people.

The National Religious Campaign Against Torture ("NRCAT") was launched following the release of the Abu Ghraib photos, during a conference of diverse American faith leaders that had been convened to examine how religious communities could respond to the use of torture. NRCAT's mission is to mobilize people of faith to end torture in U.S. policy, practice and culture. NRCAT has over 320 religious organizations as members. These include evangelical Christians, Roman Catholics, Orthodox Christians, mainline Protestants, Muslims, Jews, Sikhs, Hindus, Bahá'ís, and Buddhists. Member organizations include national denominational and faith group bodies, regional entities such as state ecumenical agencies, and local religious organizations and congregations.

One of the four areas of NRCAT's work is to end the use of torture in U.S. prisons and detention facilities, in particular the use of prolonged solitary

---

[1] Pursuant to Supreme Court Rule 37.2, counsel for *Amici Curiae* certifies that counsel of record for all parties received timely notice of the intent to file this brief, and the parties have each provided their consent in writing to the filing of this brief. Pursuant to Rule 37.6, counsel for *Amici Curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

confinement. NRCAT is engaged in supporting religious organizations and communities of faith nationwide to participate in campaigns to stop the torture of solitary confinement, partnering with survivors of solitary confinement, their loved ones, and representatives from the international human rights, legal, architectural, medical and mental health fields. Among other actions, NRCAT, with its partner the Maine Council of Churches, successfully advocated in Maine for the Department of Corrections to reduce its population of prisoners held in prolonged solitary confinement. Maine has now reduced its solitary confinement population by more than seventy percent.

Reprieve US is a non-profit organization of lawyers and investigators advocating on behalf of individuals facing execution, detention without trial and extra-judicial killing in the United States and around the world. It helps people who are suffering human rights abuses at the hands of governments. Reprieve US focuses on cases that help reshape the U.S. policy debate in accordance with international human rights norms and the affirmation of every person's dignity and legal rights.

Reprieve US works to end the death penalty in the United States and worldwide. It provides direct legal assistance to people facing the death penalty or languishing on death row. Reprieve US is currently working with more than seventy people facing execution in eleven countries, including the United States, Pakistan, the Democratic Republic of Congo, Egypt, Ethiopia, Indonesia, and UAE. Its caseworkers work with the

local lawyers of its clients, investigate cases, draft legal documents, and provide training on capital defense issues and best practices. Reprieve US also investigates and challenges the use of torture around the world.

Reprieve US works with its sister organization Reprieve UK on a variety of projects. Reprieve UK has litigated death penalty cases for more than two decades around the world and in numerous states in the United States, including in the State of Texas.

The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Among other areas, CCR has focused on the human rights implications of the United States' use of the death penalty and has recently published two reports regarding conditions on death row, including *Discrimination, Torture, and Execution: A Human Rights Analysis of the Death Penalty in California and Louisiana*, October 2013 (*available at* http://ccrjustice.org/sites/default/files/assets/files/2013-Death-Penalty-Report.pdf) and *The United States Tortures Before It Kills: An Examination of the Death Row Experience from a Human Rights Perspective*, October 2011 (*available at* http://ccrjustice.org/sites/default/files/assets/files/deathrow_torture_postition_paper.pdf).

It is CCR's position that prolonged solitary confinement amounts to torture, prohibited by

international law and by the Eighth Amendment to the United States Constitution. CCR has successfully litigated two challenges to solitary confinement, including *Wilkinson v. Austin*, 545 U.S. 209 (2005) (Ohio prisoners have a liberty interest in avoiding placement in Supermax prison), and *Ashker v. Governor of California*, No. C09-5796 (N.D. Ca.) (Eighth Amendment class action challenge to prolonged solitary confinement resulting in landmark settlement substantially limiting California's use of such confinement).

SUMMARY OF ARGUMENT

Petitioner Bobby James Moore was initially sentenced to death by the State of Texas in July 1980 when he was twenty years old. He is now fifty-six years old. Except for the period between the overturning of his initial death sentence by the Fifth Circuit Court of Appeals in October 1999, *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999), and his resentencing to death in February 2001, Mr. Moore has lived that entire time under the threat of execution.

Twice during those thirty-five years the State signed warrants setting his execution date. Once, a stay was issued less than twenty-four hours before he was scheduled to die. *Moore v. McCotter*, No. H-86-835, Order Granting Stay of Execution (S.D. Tex. Feb. 25, 1986). On the other occasion, his execution was stayed five days before the scheduled date. *Moore v. Collins*, No. H-93-3217, Order Granting Stay of Execution (S.D. Tex. Oct. 21, 1993).

Mr. Moore has spent most of the almost fifteen years since he was resentenced to death (beginning in April 2001) held in "administrative segregation" in Texas's Polunsky Unit pursuant to the Texas Department of Criminal Justice's ("TDCJ") Death Row Plan.[2] As a result, he spends twenty-two and one half hours per day, every day, alone in a cell, and, among other deprivations, is denied contact visits. He is not being held in administrative segregation because of his conduct or violation of rules while incarcerated. He is being held in administrative segregation because all death-sentenced male inmates in Texas are so held.

The potential harms and adverse consequences of holding individuals in solitary confinement, such as the administrative segregation required by TDCJ's Death Row Plan, have been acknowledged by this Court, *see, e.g.*, *In re Medley*, 134 U.S. 160, 167-71 (1890), as well as penological and medical experts, international organizations and courts. It is tantamount to torture to hold humans in the conditions of isolation under which Mr. Moore, and other men sentenced to death in Texas, are held for an indefinite period where the only prospect for release is execution. Such treatment is precisely what the Eighth Amendment's prohibition on cruel and unusual punishment is meant to preclude.

---

[2] During sixty-nine days of this period, Mr. Moore was in a county jail, not death row, for a court-ordered psychological exam. App. 46a. He also was held in a county jail for several weeks in connection with his January 2014 evidentiary hearing.

ARGUMENT

I. TDCJ Death Row Plan Imposes Prolonged, Indefinite Solitary Confinement on Petitioner and Others Sentenced to Death with No Security Justification.

The TDCJ Death Row Plan defines the conditions under which Petitioner, and all others sentenced to death in Texas, are confined.[3] Currently, and since 1999, all death-sentenced male offenders are assigned to one of three levels of Death Row Segregation. Offenders assigned to Death Row Segregation are kept in what amounts to solitary confinement. They are locked in their solid steel doored, sixty square foot, individual cells twenty-two and one half hours per day. Their meals are provided in their cells. They are not permitted to work, go to the law library, participate in group religious activities, or associate with other inmates in any way At best, they are permitted seven to twelve hours of out-of-cell physical recreation per week.[4] That recreation occurs alone "in a dog-run

---

[3] The TDCJ Death Row Plan is available online (http://tifa.org/wp-content/uploads/2014/02/Administrative-Segregation-Death-Row-Plan-1.pdf).

[4] *Id.* at 17-18. Level I offenders are allowed out-of-cell recreation in accordance with one of the three schedules: (a) one hour per day, seven days a week; (b) two hours per day, five days per week; or (c) three hours per day, four days per week. Level II offenders are permitted one hour per day, four days per week of out-of-cell recreation. And Level III offenders are permitted one hour per day, three days per week of out-of-cell recreation.

type enclosure."[5] They are not even permitted to watch television.[6]

The TDCJ Death Row Plan does contain procedures for evaluating death-sentenced offenders to determine if they are "Work Capable."[7] Work Capable offenders are eligible to hold prison jobs, engage in recreation with up to three other offenders at once, eat meals out of their cells, with others, walk escorted but unrestrained within the building and unescorted within the housing unit to showers and recreation, and participate in group religious

---

[5] Christopher Zoukis, *Texas Prison Guard Union Urges Death Row Reforms*, Prison Legal News, Oct. 2015, at 46, *available at* https://www.prisonlegalnews.org/media/issues/10pln15.corrected.pdf. *See also* Alex Hannaford, *Letters from Death Row: Alone on the Inside*, Tex. Observer, Mar. 16, 2015, *available at* http://www.texasobserver.org/letters-from-death-row-alone-on-the-inside/ ("The exercise yard for death row inmates at Polunsky is not much of a yard at all. Surrounded on all sides by concrete walls, the only view of the sky in the yard is through a grill in the roof.").

[6] In addition to the TDCJ Death Row Plan itself, descriptions of the conditions for death-sentenced male offenders in Texas may be found in *Solitary Confinement on Texas Death Row: Submission from American Civil Liberties Union of Texas, Texas Civil Rights Project, and Texas Defender Service*, Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before S. Judiciary Subcomm. on Constitution, Civil Rights & Human Rights, 113th Cong. (2014), *available at* http://solitarywatch.com/wp-content/uploads/2014/02/TX-Death-Row-ACLU-of-TX_-TCRP_-TDS.pdf, and David Mann, *Solitary Men*, Tex. Observer, Nov. 10, 2010, at 6, *available at* http://archives.texasobserver.org/issue/2010/11/12#page=1.

[7] TDCJ Death Row Plan, *supra* note 3, at 4-6.

services.[8] Prior to 1999 death row inmates could work morning and afternoon shifts at the prison garment factory and had several hours a day of group recreation. They could play board games with each other, watch television, receive education programs, and were alone in their cells only at night. They even occasionally were permitted "contact visits," allowing them in the same room with visitors without a glass partition separating them.[9]

However, even though it is the stated policy of TDCJ "to assign offenders to a meaningful prison job when available," the Work Capable program for male offenders has been suspended since 1999.[10] Accordingly, by virtue of his sentence and gender, and without regard to his conduct or actual risk, Mr. Moore has been condemned to spend an indefinite period, now approaching fifteen years, in solitary confinement.

---

[8] *Id.* at 14-15.

[9] Mann, *supra* note 6, at 8.

[10] The Work Capable program was suspended, and all male death-sentenced offenders consigned to segregation, following an attempted escape by seven death-sentenced inmates, one of whom made it out of the facility but was shot during the escape and found dead one week later. *Id.*; Scott Parks, *Report on 1998 escape led to shake-up at prison; Response may offer clues to what's in store in Connally case*, Dallas Morning News, Jan. 12, 2001, at 16A.

There is no valid justification for subjecting *every* male offender under sentence of death to solitary confinement without regard to the actual risk they pose in the prison setting. *See* Mark D. Cunningham & Mark P Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. L. 191, 203 (2002) (Death-sentenced inmates "typically do not perpetrate violence in prison."); Mark D. Cunningham et al., *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 Behav. Sci. L. 307, 316-19 (2005) (Death-sentenced offenders are not more violent than other groups of inmates and are actually less violent than some subsets of the prison population). Indefinite solitary confinement raises an Eighth Amendment issue even when motivated by significant security concerns; subjecting individuals to the harsh additional punishment of indefinite solitary confinement where there is no security or other interest being served, raises substantial Eighth Amendment concerns that should be addressed by this Court.

II. Prolonged, Indefinite Solitary Confinement, like Petitioner's Pursuant to the TDCJ Death Row Plan, Has Profound, Devastating Impacts on the Mental and Physical Health of Prisoners.

The historical understanding of the adverse impact of solitary confinement, particularly prolonged, indefinite solitary confinement, has been reinforced by modern medical and penological study as well as the revealed experience of those who have

been subjected to it. Experts and victims alike have concluded that isolation can be as, or even more, destructive to human beings than physical torture.

One hundred and twenty-five years ago, this Court in *In re Medley*, 134 U.S. 160, 167-71 (1890), observed that the deleterious effects of solitary confinement on prisoners were well understood. In ruling that a new statutory requirement that the condemned prisoner be held in solitary confinement was sufficient additional punishment triggering application of the *Ex Post Facto* Clause, the Court observed that "serious objections" had arisen to maintaining prisoners in total isolation because "[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." *Id.* at 168.

In his recent concurrence in *Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2208-10 (2015), Justice Kennedy noted that understanding of the impact of isolation on prisoners went back at least to the eighteenth century. A British prison reformer of the era wrote that "criminals who had affected an air of boldness during their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears when brought to these darksome solitary abodes." *Id.* at 2209. The devastating impact of solitary

confinement did not require the methodologies of modern cognitive science. It was recognized early on as destructive of human dignity and personality.

Modern medical researchers have reinforced that insight by identifying a variety of adverse consequences to individuals subject to prolonged isolation in prison and other situations. Among the commonly found symptoms are hyper-responsivity to external stimuli; perceptual distortions, illusions, and hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts of primitive aggressive fantasies; overt paranoia; and problems with impulse control.[11] The long-term consequences of prolonged isolation include persistent symptoms of post-traumatic stress, such as flashbacks, chronic hypervigilance, and a pervasive sense of hopelessness, as well as lasting personality changes.[12] "Suicides occur disproportionately more often in segregation units than elsewhere in prison."[13]

---

[11] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol'y 325, 333-36 (2006). *See also* Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49(1) Crime and Delinquency 124 (2003) (placement in isolation has been associated with feelings of hopelessness, irritability, aggression, suicidal ideation and a sense of impending emotional breakdown).

[12] Grassian, *supra* note 11, at 353.

[13] Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry and L. 104, 105 (2010) (citing Raymond F. Patterson & Kerry Hughes, *Review of completed suicides in the California Department of Corrections*

Summarizing the research in the field, *A Sourcebook on Solitary Confinement* found that the effects on health of solitary confinement include physiological signs and symptoms, such as: gastro-intestinal, cardiovascular and genito-urinary problems; diaphoresis (sudden excessive sweating); insomnia; deterioration of eyesight; lethargy, weakness, profound fatigue; feeling cold; heart palpitations; migraine headaches; back and other joint pains; poor appetite, weight loss, and diarrhea; and tremulousness.[14] An even larger array of psychological symptoms were found, including: anxiety, ranging from feelings of tension to full-blown panic attacks; depression, varying from low mood to clinical depression; anger, ranging from irritability to rage; cognitive disturbances, ranging from lack of concentration to confused states; perceptual distortions, ranging from hypersensitivity to hallucinations; paranoia and psychosis, ranging

---

and Rehabilitation, 1999 to 2004, 59 Psychiatr. Serv. 676, 677-81 (2008); Thomas W White et al., *A comprehensive analysis of suicide in federal prisons: a fifteen-year review*, 9 J. Correct Health Care 321-43 (2002); Lindsay M. Hayes, National Center on Institutions and Alternatives, *Prison Suicide: an Overview and Guide to Prevention* (1995), *available at* http://www.nicic.gov/library/files/012475.pdf).

[14] Sharon Shalev, *A Sourcebook on Solitary Confinement*, Section 2.3, The negative health effects of solitary confinement: reported symptoms (Mannheim Centre for Criminology, London School of Economics and Political Science, 2008); *see also* Sharon Shalev, *Chapter 5: Solitary Confinement as a Prison Health Issue*, PRISONS AND HEALTH 27 (World Health Organization, 2014).

from obsessional thoughts to full-blown psychosis; and self-harm and suicide.[15]

The impact of isolation can be seen not only in observed behaviors and reported symptoms, but also in clinical observations of prisoners' brains. "[E]ven a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium."[16]

Studies of prisoners of war held in solitary confinement reveal similar consequences of the practice. A 1992 study of detainees in the former Yugoslavia found that the most severe brain abnormalities were in prisoners who either sustained head traumas sufficient to render them unconscious or who had been placed in solitary confinement.[17] "Without sustained social

---

[15] *Id.*

[16] Grassian, *supra* note 11, at 331. *See also* Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. Abnormal Psychol. 54, 57-58 (1972) (declining EEG alpha frequency observed in study of prisoners who volunteered to spend a week in isolation).

[17] Atul Gawande, *Hellhole: Is Long-Term Solitary Confinement Torture?*, The New Yorker, Mar. 30, 2009, http://www.newyorker.com/magazine/2009/03/30/hellhole. *See also* Elizabeth A. Wilson, *Beyond the Rack: Post-Enlightenment Torture*, 39 New Eng. J. on Crim. & Civ. Confinement 41, 59 (2013) ("Solitary confinement can result in brain changes similar to those from severe blows to the head causing unconsciousness.") (citing Andelko Vrca et al., *Visual Evoked*

interaction, the human brain may become as impaired as one that has incurred a traumatic injury."[18] Similarly, a study by the U.S. military of former prisoners of war returned from imprisonment in Vietnam reported that they found social isolation to be as torturous and agonizing as any physical abuse they suffered.[19]

Perhaps the most powerful evidence of the impact of prolonged, indefinite solitary confinement is the statements of those who have been subjected to it. John McCain spent five and a half years as a prisoner of war – over two of those years were spent in isolation. Regarding those years, Senator McCain wrote "[i]t's an awful thing, solitary . . [i]t crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."[20]

Terry Anderson spent seven years as a hostage of Hezbollah in Lebanon. The New Yorker summarizes the description of his ordeal in his memoir, *Den of Lions*, and relates some of the impacts of solitary confinement:

> He was despondent and depressed. Then, with time, he began to feel something more. He felt himself disintegrating. It was as if his brain

---

Potentials in Relation to Factors of Imprisonment in Detention Camps, 109 Int. J. Legal Med. 114, 114-15 (1996)).

[18] Gawande, *supra* note 17.

[19] *Id.*

[20] John McCain, Faith of My Fathers 206 (2000).

were grinding down. A month into his confinement, he recalled in his memoir, "The mind is a blank. Jesus, I always thought I was smart. Where are all the things I learned, the books I read, the poems I memorized? There's nothing there, just a formless, gray-black misery. My mind's gone dead. God, help me."

He was stiff from lying in bed day and night, yet tired all the time. He dozed off and on constantly, sleeping twelve hours a day. He craved activity of almost any kind. He would watch the daylight wax and wane on the ceiling, or roaches creep slowly up the wall. He had a Bible and tried to read, but he often found that he lacked the concentration to do so. He observed himself becoming neurotically possessive about his little space, at times putting his life in jeopardy by flying into a rage if a guard happened to step on his bed. He brooded incessantly, thinking back on all the mistakes he'd made in life, his regrets, his offenses against God and family. .

For unpredictable stretches of time, he was granted the salvation of a companion – sometimes he shared a cell with as many as four other hostages – and he noticed that his thinking recovered rapidly

> when this occurred. He could read and concentrate longer, avoid hallucinations, and better control his emotions. "I would rather have had the worst companion than no companion at all," he noted.
>
> . After a few weeks, he felt his mind slipping away again. "I find myself trembling sometimes for no reason," he wrote. "I'm afraid I'm beginning to lose my mind, to lose control completely."
>
> One day, three years into his ordeal, he snapped. He walked over to a wall and began beating his forehead against it, dozens of times. His head was smashed and bleeding before the guards were able to stop him.[21]

The history, research and testimony of those who have lived it provide ample validation for the observation that "[s]olitary confinement is recognized as difficult to withstand; indeed, psychological stressors such as isolation can be as clinically distressing as physical torture."[22]

---

[21] Gawande, *supra* note 17.

[22] Metzner, *supra* note 13, at 104 (citing Hernán Reyes, *The worst scars are in the mind: psychological torture*, 89 Int. Rev. Red Cross 591-617 (2007); Metin Başoğlu et al., *Torture vs. other cruel, inhuman and degrading treatment: is the distinction real or apparent?*, 64 Archives of Gen. Psychiatry 277-85 (2007)).

III. International Human Rights Organizations and Courts Have Found that Prolonged, Indefinite Solitary Confinement, like Petitioner's Pursuant to the TDCJ Death Row Plan, Constitutes Torture.

The United Nations Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment has recognized that given its severe adverse health effects, the use of solitary confinement itself can amount to acts prohibited by article 7 (prohibition of torture and ill-treatment) of the International Covenant for Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("ICCPR"). It may also constitute torture as defined in article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") or cruel, inhuman or degrading treatment of punishment ("CIDT") as defined in article 16 of the CAT. *See* U.N. Special Rapporteur of the Human Rights Council, Interim Rep. on torture and other cruel, inhuman or degrading treatment or punishment, ¶ 70, U.N. Doc. A/66/268 (Aug. 5, 2011).

The U.N. Human Rights Committee has also noted that prolonged solitary confinement of the detained or imprisoned person might amount to acts prohibited by article 7 of the ICCPR. *See* U.N. Rep. of the Human Rights Comm., General Comment No. 20 (44) (art. 7), U.N. Doc. A/47/40, annex VI, sec. A, at 193, GAOR, 47th Sess., Supp. No. 40 (1992). And the Istanbul Statement on the Use and Effects of

Solitary Confinement, adopted on December 9, 2007 at the International Psychological Trauma Symposium, cautions that "[a]s a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort." *Instanbul Statement on the Use and Effects of Solitary Confinement*, 18 Torture, no. 1, 2008, at 63, 66; *see also* U.N. Special Rapporteur of the Human Rights Council, Interim Rep. on torture and other cruel, inhuman or degrading treatment or punishment, Annex, 25 U.N. Doc. A/63/175 (July 28, 2008).

Similarly, international courts have consistently found that prolonged or indefinite isolation are strictly prohibited because they breach the international legal prohibition against torture and/or CIDT. *See, e.g.*, *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 87 (Nov. 27, 2003) (restating the finding of the Inter-American Court of Human Rights that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment"); *Bámaca Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 150 (Nov. 25, 2000) (finding that "the prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being"); *Babar Ahmad and Others v. United Kingdom*, Eur. Ct. H.R. App. Nos. 24027/07 et al., ¶ 210, 52 I.L.M. 443, 2013 WL 5785362 (Apr. 10, 2012) (stating that while the

Court has never specified a period of time beyond which solitary confinement will attain the minimum level of severity required by article 3 (prohibition against torture and ill-treatment), "solitary confinement, even in cases entailing relative isolation, cannot be imposed indefinitely on a prisoner"); *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, ¶ 9.4 (Aug. 10, 1994) (total isolation, even for a period of several days, without the possibility of recreation, violates article 7 of the ICCPR).

Other courts have found that placing individuals in solitary confinement for periods of five to six years violates article 10 of the ICCPR (failing to respect the inherent dignity of the human person). *See, e.g., Xavier Evans v. Trinidad and Tobago*, Communication No. 908/2000, U.N. Doc. CCPR/C/77/D/908/2000, ¶ 6.4 (Mar. 21, 2003); *Sobhraj v. Nepal*, Communication No. 1870/2009, U.N. Doc. CCPR/C/99/D/1870/2009, ¶ 7.7 (July 27, 2010); *see also Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998 (Mar. 26, 2002) (finding violation of article 10 based on conditions of confinement, which included eight years on death row in solitary confinement); *Yong-Joo Kang*, Communication No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999, ¶ 7.3 (July 15, 2003) (finding violation of article 10 where applicant was held in solitary confinement for thirteen years based on his presumed political opinion. Detention in solitary confinement for a period of 13 years "is a measure of such gravity, and of such fundamental impact on the

individual in question, that it requires the most serious and detailed justification.").

The European Court of Human Rights has found that a stringent regime of solitary confinement of approximately three years constitutes inhuman and degrading treatment. *Iorgov v. Bulgaria*, Eur. Ct. H.R. App. No. 40653/98, ¶¶ 82-84, 86 (Mar. 11, 2004), http://hudoc.echr.coe.int/eng?i=001-61679 (finding violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms where the applicant was held in solitary confinement for approximately three years in a small cell, was allowed one hour out-of-cell time in an open yard with other inmates, spent almost 23 hours per day alone in his cell, and could receive one or two half-hour visits per month. The Court considered that "the stringent custodial regime to which the applicant was subjected and the material conditions in which he was detained must have caused him suffering exceeding the unavoidable level inherent in detention."). *See also Polay Campos v. Peru*, Communication No. 577/1994, U.N. Doc. CCPR/C/61/D/577/1994, ¶ 8.7 (Nov. 5, 1997) (finding that relative isolation for 23 hours a day in a small cell with only 10 minutes of sunlight per day constitutes treatment in violation of articles 7 and 10 of the ICCPR). The European Court of Human Rights also stated that "even for difficult and dangerous prisoners, periods of solitary confinement should be as short as possible," and found violations even for solitary confinement of less than three years. *See Mathew v. Netherlands*, 2005-IX Eur. Ct. H.R. 57, ¶¶ 197, 217 (Sept. 29, 2005) (finding that the applicant was subjected to inhuman treatment,

in violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, by virtue of his detention "in a situation amounting to solitary confinement," which included confinement to his cell for 23 hours a day).

Relying upon article 5 of the American Convention on Human Rights, which recognizes the right to the integrity of the person, the Inter-American Court of Human Rights found that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being." *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 156 (July 21, 1988).

Amici bring to the attention of the Court the uniform view of the medical, psychiatric and international legal community to underline that the experience of solitary confinement and the ineluctable mental and physical disintegration of its victims is one which is universally devastating and destructive, is unjustifiable as a security matter, and is inevitably cruel and unusual under the standards of the Eighth Amendment, customary international law, treaties to which the U.S. is signatory, and the common law.

CONCLUSION

Prolonged, indefinite solitary confinement has been long recognized as having devastating effects on individuals, effects like those of physical torture. It has been criticized and rejected by international organizations and courts. It violates evolving standards of decency as incorporated into the Constitution by the Eighth Amendment to subject a person to such confinement and then execute them. Accordingly, and for the reasons set forth in the petition, the writ of certiorari should be granted.

Dated: January 19, 2016

Respectfully submitted,

Eric L. Lewis
Counsel of Record
Jeffrey D. Robinson
Esther Yong
LEWIS BAACH PLLC
1899 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20006
(202) 833-8900
eric.lewis@lewisbaach.com

Counsel for Amici Curiae

No. 15-797

JUL 28 2016

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

JOINT APPENDIX

CLIFFORD M. SLOAN
Counsel of Record
LAURYN K. FRAAS
DONALD P. SALZMAN
MICHAEL A. MCINTOSH
BRENDAN B. GANTS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

ALEX BLASZCZUK
PETER HORN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

LUKE VARLEY
601 Lexington Avenue
New York, NY 10022

Counsel for Petitioner

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

RANCE CRAFT
MICHAEL P. MURPHY
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

Counsel for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 15, 2015
CERTIORARI GRANTED JUNE 6, 2016

TABLE OF CONTENTS

	Page
Court of Criminal Appeals Relevant Docket Entries	1
Affidavit of Robert P. Borda, dated Dec. 16, 2013	6
Testimony of Robert P. Borda, dated Jan. 2, 2014	18
Direct examination: 133:10 – 158:4	18
Cross examination: 158:9 – 170:23	39
Redirect examination: 171:3 – 175:3	50
Recross examination: 175:10 – 178:24	54
Further redirect examination: 179:4 – 179:15	57
Expert Report of Shawanda Williams-Anderson, dated Dec. 20, 2013	58
Testimony of Shawanda Anderson, dated Jan. 3, 2014	75
Direct examination: 48:25 – 65:18	75
Cross examination: 65:23 – 66:2; 68:9 – 69:11; 70:15 – 71:7; 74:4 – 74:11	90
Redirect examination: 76:23 – 79:8	93
Further redirect examination: 81:8 – 82:10	95
Curriculum Vitae of Shawanda W. Anderson	97
Testimony of Stephen Greenspan, dated Jan. 2, 2014	113

TABLE OF CONTENTS—Continued

Page

Direct examination: 181:19 – 182:16; 186:20 – 187:6; 187:25 – 188:13; 188:20 – 189:17; 190:4 – 190:11; 194:17 – 195:24; 200:10 – 201:5; 211:8 – 212:2 113

Cross examination: 212:17 – 223:1..... 119

Testimony of Stephen Greenspan, dated Jan. 3, 2014..... 128

Cross examination: 4:22 – 8:16 128

Redirect examination: 40:3 – 40:18..... 132

Testimony of Kristi Compton, dated Jan. 3, 2014 133

Direct examination: 83:18 – 144:1..... 133

Cross examination: 144:19 – 179:5..... 185

Redirect examination: 179:10 – 183:11..... 215

Recross examination: 184:5 – 187:18 219

Further redirect examination: 187:25 – 188:14 222

Curriculum Vitae of Kristi L. Compton..... 224

Affidavit of Gina T. Vitale, dated June 16, 2003 229

Affidavit of Richard Garnett, dated June 16, 2003 248

Testimony of Bettina Wright, dated Feb. 12, 2001 256

Direct examination: 6:11 – 21:14; 25:1 – 26:6 256

Redirect examination: 42:20 – 43:2..... 269

COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-13,374-05

BOBBY JAMES MOORE,

v.

TEXAS,

RELEVANT DOCKET ENTRIES

DATE FILED	DOCKET TEXT
02/24/2014	Article 11.071 Writ Received
02/24/2014	Reporter's Record Received
06/04/2014	Order Filed
07/14/2014	Supplemental Clerk's Record Filed
10/02/2014	Supplemental Clerk's Record Filed
01/28/2015	Case Set for Submission
01/28/2015	Designation for Non Argument Cases
02/11/2015	Case Submitted
09/16/2015	Opinion Issued
10/12/2015	Mandate Issued

185th JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 314483-C

BOBBY JAMES MOORE,

v.

TEXAS,

RELEVANT DOCKET ENTRIES

DATE FILED	DOCKET TEXT
06/17/2003	Application for Writ of Habeas Corpus
12/23/2003	Respondent's Original Answer
01/27/2004	Respondent's Supplemental Answer
06/23/2005	Habeas Counsel's Letter Regarding Applicant's Withdrawal of His Prior Request to Discontinue Habeas Application and Appeals
10/03/2005	Applicant's Pro Se Ex Parte Motion to Waive Further Appeal
10/07/2005	Applicant's Pro Se Ex Parte Motion to Waive Further Appeals
10/07/2005	Applicant's Pro Se Ex Parte Motion to Waive Further Appeals
02/13/2008	Respondent's Motion Requesting Court to Order Trial and Appellate Counsel to File Affidavit

DATE FILED	DOCKET TEXT
02/13/2008	Order
02/13/2008	Respondent's Motion Requesting Court to Order Trial Counsel to File Affidavit
02/13/2008	Order
03/07/2008	Amended Order
04/30/2008	Affidavit of Robert Morrow
01/22/2009	Stephen Morris Motion to Withdraw as Defense Counsel
02/03/2009	Order
03/19/2009	Order Appointing Patrick McCann as Habeas Counsel
02/28/2011	District Attorney Pro Tem's Motion for Appointment of Investigator
11/16/2011	Article 11.071 Factual Supplement to Writ
03/19/2013	District Attorney Pro Tem's Motion for Appointment of Mental Health Professional
03/19/2013	Order
11/14/2013	Ex Parte Motion for Funding of a Neuro-Psychological Expert
11/14/2013	Order
11/20/2013	Ex Parte Motion for Funding of a Neuro-Psychological Expert
11/20/2013	Order
11/20/2013	Ex Parte Motion for Funding of an Intellectual Disability Expert

DATE FILED	DOCKET TEXT
11/20/2013	Order
11/20/2013	Ex Parte Motion for Funding of a Psychological Expert
11/20/2013	Order
11/20/2013	Credentials of Shawanda W. Anderson, Ph.D., HSPP
12/19/2013	Affidavit of Robert P. Borda Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Dr. Shawanda Williams-Anderson Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Mark Fronckiewicz Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Lonnie Moore Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Larry Baker Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Clara Jean Baker Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Parneva Williams Regarding Bobby Moore's Intellectual Disability and Mental Retardation
01/02/2014-01/03/2014	Hearing Regarding Application for Writ of Habeas Corpus

DATE FILED	DOCKET TEXT
01/21/2014	Applicant's Proposed Atkins Findings
01/23/2014	Respondent's Proposed Findings of Fact and Order
02/06/2014	Court's Findings of Fact and Conclusions of Law

cnp Consultants, PLLC
P.O. Box 735
Manvel, TX 77578-0735

ROBERT P. BORDA, PH.D.
Clinical Neuropsychologist

12046 Dairy Ashford Road, Suite 260
Sugar Land, Texas 77498-3149

602 McKeever Road (Houston Southwest Airport)
Arcola, Texas 77583-2671

Telephone: (281) 468-6037
Facsimile: (281) 431-8384

AFFIDAVIT IN THE CASE OF BOBBY JAMES MOORE

I am licensed by the State of Texas as a Psychologist, and have been practicing Clinical/Neuro Psychology for over twenty-five years. In my practice, I evaluate the cognitive abilities of a wide range of individuals, from younger ones who are suspected of having learning disabilities or attentional deficits to older ones who are suspected of having suffered traumatic brain injury or who might have a form of dementia. In my practice, I commonly administer a variety of formal measures of intellectual abilities, including standardized tests such as the Wechsler scales. My training and experience make me well qualified to interpret the findings from intelligence tests, and to make a diagnosis of mental retardation when it is appropriate.

My academic background includes a Bachelor's Degree from Princeton University (where I majored in Psychology), a Doctoral degree from Baylor College of Medicine (majoring in Neurophysiology), and a Doctoral Degree from The University of Houston (in

the Clinical/Neuro Psychology program). In addition to my private practice in clinical neuropsychology, I also serve as an expert witness for the Social Security Administration (SSA) in disability claims which have been appealed. I testify as a medical expert in the area of mental disorders, and frequently will be asked to determine if a claimant meets the SSA's criteria for mental retardation. I am a member of the American Psychological Association and the National Academy of Neuropsychology, was one of the founding members of the Houston Neuropsychological Society (where I was a member of the Board of Directors for 16 years), am a Diplomate of the American Board of Professional Disability Consultants, and listed on the National Registry of Health Services Providers in Psychology. In addition to outpatient private practice, I also have worked in rehabilitation facilities where patients with brain injuries were being treated.

Although forensic psychology is not my specialty, in 1993 I was asked to provide testimony regarding Mr. Moore's intellectual abilities. I did not personally evaluate Mr. Moore, but instead reviewed records which were supplied to me; from this review, which included some formal IQ testing, I concluded that Mr. Moore likely was functioning in the Borderline Range of intellectual functioning, corresponding to an IQ of 70-79. I recently have been given the opportunity to review extensive additional records; if these had been available to me in 1993 I would have reached a different conclusion. Several factors would influence my conclusions at the present time. One is that the "Flynn Effect" was not yet widely accepted, as Flynn only published a paper on the effect of out-of-date test norms in 1984. This effect is now well accepted in the

field of psychology, and documents that the population performs better on IQ tests over time, so that norms established ten years prior to the actual testing date could overstate an individual's actual IQ by as much as three "points". This finding recently was corroborated by psychologists at the University of Houston (Fletcher, Stuebing and Hughes, J. Psychoeducational Assessment, 2010). In fact, more recent studies at the University of Houston (manuscript submitted for publication by L. Hughes, J. Fletcher, K. Steubing, and M. Hiscock) suggest that at the extremes of the IQ range (i.e., IQs lower than 80 or higher than 120) the "Flynn effect" is even more pronounced, as much as five or ten "points" of inflation for each decade of test score obsolescence. Other factors that would influence my opinion now are fairly extensive additional test findings and testimony from family members which have been made available to me, these spanning a much larger time frame than I was able to review before. Also, the definition of "mental retardation", or intellectual disability (ID), has changed to some extent, and differs according to whether that of the various editions of the American Psychiatric Association's (APA) Diagnostic and Statistical Manual (DSM), the definition of The American Association on Intellectual and Developmental Disabilities (AAIDD), or the requirements listed by SSA for disability are being referenced.

In an attempt to establish standards for the definition of what then was called "mental retardation", the early editions of the DSM began to urge guidelines based upon performance on standardized tests of intelligence, such as the Wechsler Scales. The APA's DSM-

IV (1994) lists three requirements to meet the definition of Mental Retardation: 1) Age of onset before 18 years, 2) Significantly sub-average intelligence with IQ approximately 70 or below on an individually administered IQ test, and 3) Concurrent deficits or impairments in present adaptive functioning in at least two of the following areas (communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety). The recent edition of the manual (DSM-5, May, 2013) introduces the notion of ID being a neurodevelopmental disorder, one of a family of organic mental disorders arising in childhood and marked by limitations in cognitive development. This new version of the DSM also states that intellectual functioning can be assessed more reliably by comprehensive neuropsychological measures of frontal lobe-based "executive functions" (e.g., planning, reasoning, monitoring of performance, and inhibition of inappropriate responses), measures which are not well assessed by IQ testing. By DSM-V, ID is not determined solely by reference to a rigid "bright line" criteria of IQ, but more by assessment of adaptive functioning (such as gullibility and risk awareness), a definition which much more closely resembles that used by the AAIDD, and recognizes that "Full Scale IQ is an imprecise window into the quality of (an individual's) cognitive functioning" (DSM-V, p. 37).

For the purposes of meeting Federal disability criteria, the SSA requires "significantly sub-average general intellectual functioning with deficits in adaptive functioning initially manifested during the devel-

opmental period: i.e., before age 22." Listing requirements can be met in three ways: 1) the applicant could have a valid verbal, performance or full scale IQ of 59 or less, 2) the applicant could have a valid verbal, performance or full scale IQ of 60-70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function, or 3) the applicant could have a valid verbal, performance or full scale IQ of 60-70 resulting in at least two of the following: Marked restriction of activities of daily living, or Marked difficulties in maintaining social functioning, or Marked difficulties in maintaining concentration, persistence or pace, or Repeated episodes of decompensation, each of extended duration.

Versions I-IV of DSM and the SSA definitions rely heavily on formal test scores on an instrument such as a Wechsler Scale, but obviously also consider functional abilities which impact an individual's ability to live independently. The AAIDD's definition of Intellectual Disability is more broadly based, yet quite similar. That definition of mental retardation requires "significant limitations in intellectual functioning, significant limitations in adaptive behavior, and age of onset before age 18". The operational definitions are as follows: "Intellectual functioning"—an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations. This would equate to an IQ score which falls below the 3rd percentile (73 or below). "Adaptive behavior"—performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without intellectual disability that is

approximately two standard deviations below the mean in either conceptual, social or practical skills. The AAIDD stresses that the definition should not specify a hard and fast cutoff point/score for meeting the requirements of intellectual impairment, but rather needs to factor in such variables as practice effects (which can artificially raise scores by as much as 2/3 of a standard deviation or more), fatigue effects, and the age of the norms used (referring to the Flynn Effect), as well the concept of statistical error.

From the records which I reviewed recently, it appears that Mr. Moore would satisfy all of these definitions of Intellectual Disability, including those of the APA, the AAIDD, and the SSA. He clearly had marked deficits in adaptive functioning. Examples of this include his being raised in a physically- and emotionally-abusive family environment, yet never seeking any outside intervention, when he would be "kicked out of the house", he would sleep on neighborhood porches or in cars rather than asking a neighbor or relative for assistance. When he finally did move out of his parent's home permanently, he "lived on the streets" for most of his teenage years; he sometimes was permitted to sleep in a back room of a pool hall in exchange for performing simple chores, His family was very poor and he often went without eating; Mr. Moore likely had severe nutritional deficits when he was a child, as well as numerous head injuries (from his father, from being beaten by others his age, and by jumping from a moving train), and both likely contributed to his intellectual deficiencies. By testimony from family members, Mr. Moore would eat from garbage cans when he was famished, even though he had contracted food poisoning in the past from this

behavior; this shows that he was not able to learn from past experiences. He also had communication deficits, with speech impediment and difficulty grasping what others said. He was a very poor student, failed the first grade twice, and apparently only received "social promotions" in school after that point. He also was noted in school records to exhibit attentional deficits. After years of academic failure, Mr. Moore's school recommended when he was 13 years of age that his teachers conduct daily drills on such basic things as days of the week, months of the year, seasons, standards of measure, and telling time. This suggests that his intellectual limitations were profound. He was reported by family members to "always be a follower", and relied on others to make decisions for him. He was described by teachers as being "very withdrawn", so it is obvious that he had very limited social skills as well as deficits in adaptive functioning.

With respect to the AAIDD's requirement of documented deficiencies in intellectual functioning, I reviewed testing which was performed at various times in Mr. Moore's adolescence. The first instrument which was used (1971) was the Otis-Lennon Mental Abilities Test. This test is used primarily to assess academic needs, and is not accepted as an instrument appropriate for the assessment of mental retardation or intellectual deficiency. A year later, Mr. Moore was administered the Slosson Intelligence Test for Children (SIT). At that time, the norms for the SIT would have been over ten years out of date, yet Mr. Moore's score (uncorrected for the Flynn Effect) still equated to an IQ of only 57. Using the appropriate correction factor, this would place his score closer to 50, clearly well within the range of Mental Retarda-

tion by the criteria of any organization or agency. A year later, Mr. Moore was administered the Wechsler Intelligence Scale for Children (WISC); his score on this equated to an IQ of 78, but the norms were 25 years out of date (!) and Flynn-adjustment would lower his score to 65 or below. A higher score on similar tests administered sequentially is common, and relates to what is termed regression towards the mean. If the same test is administered sequentially it is expected, based on statistics alone, to yield progressively higher scores. Even so, when Mr. Moore was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) in 1989, he earned an IQ score of 74. At that time, the norms for this test were ten years out of date, so with Flynn Effect correction the score would be no higher than 71.

Mr. Moore also was administered several other tests over the years which were not, strictly speaking, "IQ" tests, but nonetheless can give a rough approximation of an individual's intellectual and social development. One of these was the Goodenough "Draw-a-Person" Test, which was given in 1973, and placed him at the upper limit of the Mentally Retarded Range. The Bender Visual Motor Gestalt Test, widely used even today as a screening test for organic mental disorders, was administered that same year and placed him well below the first percentile in visuo-motor development (well within the Retarded Range).

When all of these test scores are considered in light of the latest findings at the University of Houston, Mr. Moore's intelligence would be even lower. Even using their more conservative estimate of five IQ "points" of score inflation for every decade of norms obsolescence, the prior testing results would be adjusted as follows:

"Score" refers to the IQ based upon the published test norms, "FCS" refers to the score adjusted for the Flynn effect, and "UHS" refers to the tested IQ corrected using the latest estimates from the University of Houston's research. The dates given are for when the test was administered, and when the norms were determined (typically two years prior to test publication).

Administered/ Norms	Test Instrument	Score	FCS	UHS
1972 / 1962	Slosson	57	54	52
1973 / 1947	WISC	78	70	65
1973 / 1936	Bender VMGT	67	56	48
1973 / 1961	Goodenough	71	67	65
1989 / 1979	WAIS-R	74	71	69

Also to be considered in evaluating these score would be the Standard Error of Estimate (SEM), the statistical measure of how accurate a test score can be considered to be. For most IQ tests, the SEM is +/- five points. Clearly, by all of these measures Mr. Moore's IQ can be considered to fall below 70.

Recently I had the opportunity to review a statement by Gina T. Vitale, LMSW, CCFC, which summarizes the findings relative to Mr. Moore's intellectual deficiencies. She concluded that, based upon formal assessment, social history, and interview of family members, Mr. Moore should be considered to be mentally retarded, a conclusion which agrees with mine. I also reviewed the opinions of Richard Garnett, Ph.D. concerning Mr. Moore's intellectual limitations, and

his opinions also agree with mine. Dr. Shawanda Williams-Anderson, a neuropsychologist, examined Mr. Moore during November and December of 2013. She concluded that Mr. Moore's abilities innately have been better in nonverbal areas than in verbal, but that he demonstrated behavioral and intellectual deficits consistent with traumatic brain injury, likely with involvement of the frontal regions.

I was given the opportunity to examine Mr. Moore personally on December 12, 2013, at the Harris County Jail. I was provided with a private room (guards were stationed immediately outside of the door), and for the evaluation Mr. Moore's hand shackles were removed; ankle shackles remained in place. At the time of the evaluation, Mr. Moore was 54 years of age. He presented as a fairly tall black male with a well-trimmed beard, who was quiet and passive but pleasant and cooperative. Eye contact was marginal, but he appeared to give a good effort on all tasks. A very limited test battery was administered since he had been evaluated so many times in the past, and even recently. He was found to be oriented to person, place and time, and knew the purpose of the examination. He could read aloud and execute very simple commands (e.g., "Place your left hand on top of your right hand"). He was given three words to remember ("apple, penny, blue") and told that he later would be asked to recall them. Immediate recall was 3/3, but delayed recall only 1/3. He was asked to write a simple sentence describing the examiner; he printed, "You are short" (this is accurate, but not very tactful).

One formal measure of IQ was administered, the Raven's Colored Progressive Matrices (RCPM). This is a nonverbal measure of reasoning, similar to the

"Matrices" subtest of the newer Wechsler scales, and has been widely used in the assessment of individuals who either cannot perform the Wechsler-type tests because of linguistic or physical limitations, or who are suspected of having marginal intellectual abilities. On the RCPM he earned a score of 21 (out of 36); the norms for the RCPM were established in 1975 - 1976 and his score would equate to an IQ of 85. With Flynn correction, his current score would equate to an IQ of 74, but with the U/H correction would be closer to 66.

I also administered the Trail Making tests, and Mr. Moore performed somewhat better than he did in Dr. Williams-Anderson's evaluation a few weeks prior, suggesting that practice effects were present. His completion times fell within the Borderline-Low Average Range. He also was administered the Timed Sustained Attention Test (TSAT), a measure of mental tracking and flexibility. Even without any correction factors (norms were established in 1989), his performance fell within the Retarded Range (below the first percentile).

One other test was administered to Mr. Moore, the Tinker Toy Test (TTT). Although not a test of IQ *per se,* the TTT is used widely in head trauma rehabilitation centers as one measure of "executive functioning". Mr. Moore never had seen this test before (indeed, had no idea what Tinker Toys were), so no practice effects were present. Scores on this test have a range of 13 to less than one, with scores of seven and above being favorable indicators for employment. According to the authors of the test (Bayless, Varney & Roberts, J. Clin. Experimental Neuropsychology, 1989), scores below seven generally correlate with independent observations of impaired empathy, judgment, initiation, or "absent-mindedness". Mr. Moore's

score on the TTT was only one, and would be compatible with frontal lobe-based deficits in executive functioning.

Reviewing all of the test data available for Mr. Moore, I now would conclude that at the time he was charged with a crime Mr. Moore was functioning at no higher than the first or second percentile of intellectual functioning. This would satisfy the most common criteria for documented deficiency in intellectual abilities, and severe deficits in adaptive functioning have been outlined above. Based on this, it is my opinion that Mr. Moore should be considered as having a significant Intellectual and Developmental Deficiency, and by any current standards should be considered to have functioned within the Mentally Deficient (or Mentally Retarded) range for all of his teen and adult life. This would be the case regardless of whether a "bright line" standard, or an adaptive functioning measure, is utilized.

/s/ Robert P. Borda
Robert P. Borda, Ph.D.
Clinical Neuropsychologist

SWORN TO AND SUBSCRIBED BEFORE ME, by Robert P. Borda, Ph.D., on the, 16 day of December, 2013, to certify which witness my hand and seal of office.

My commission expires 10/13/17

/s/ Lauralee O'Brien
Notary in and for the State of Texas

REPORTER'S RECORD
VOLUME 2 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

V.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 2nd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[133] Q. (BY MR. MCCANN) Dr. Borda, what do you do for a living?

A. I'm a clinical neuropsychologist in private practice.

Q. Let's go through your education and training and background quickly for the record, if we could. Where did you attend undergraduate studies?

A. Where? Princeton.

Q. And where'd you go for graduate studies?

A. Well, I started at the University of Houston in psychology and then because my advisor left and I was working on a research project at Baylor Med, I ended up switching to Baylor Med and got master's and doctor's degrees in physiology from Baylor Med, was on the faculty there for 11 or 12 years and then went back to graduate school at U of H and got a second doctorate in [134] neuropsychology.

Q. And how do you use those degrees now?

A. I'm in private practice. My physiology training was really in neurophysiology, so that's always had to do with brain function, and I see a lot of people in my practice now that have neurological disorders. So part of my practice, maybe not quite half, is devoted to clinical assessment of people that have some sort of brain dysfunction either from head injury, dementia, toxic exposure, things like that. The other part of my practice is testifying as an expert witness in disability hearings for social security.

Q. Just let me explore that briefly. You're saying you testified as an expert on people who are applying for benefits for intellectual disability?

A. Well, they're applying for federal disability and if their problems involve mental disorders, then I might get called in to help the Judge make a decision.

Q. Do you have any honors or board certifications in your field?

A. I'm board certified by the American Board of Professional Disability Consultants, members of, you know, various professional societies. I'm one of the founding members of the Houston Neuropsychological Society. I was a member of the board of directors and was treasurer of the [135] organization for 16 years, I believe, a long time. So, that's it.

Q. Okay. Have you published any articles in your field?

A. Well, not since I've been in private practice.

That's kind of incompatible. I've published a lot of papers in neurophysiology when I was at Baylor but not since. Maybe one.

Q. Okay. And during this time have you had an opportunity many years ago to consult on this very case back in probably the '90s?

A. 1993, I had to go back and look at my records. It was a long time ago. I had only been in private practice about eight years, I think, at that point, yes.

Q. Okay. And did you review records and provide testimony at a different hearing in '93 in federal court regarding what we would call a Penry claim of intellectual disability for mitigation?

A. Yes.

Q. You did?

A. I did.

Q. And did my office and specifically a young associate of mine, Luke Farley, approach you, gosh, a year or more ago regarding reviewing your work and coming back to consult on this case again?

[136] A. Yes, sir.

Q. And since then have you reviewed a number of medical records and affidavits and other items that we had provided to you over the course of the last year?

A. Yes.

Q. Have you also had a chance to examine in person Mr. Moore at the facility he was being held at?

A. Yes, sir.

Q. And when did you conduct that examination?

A. Mid-December.

Q. Okay. And we asked you to consult regarding what is now referred to often as intellectual disability but in our old-fashioned parlance is called making a determination of mental retardation; is that fair?

A. Yes, sir.

Q. Okay. Tell us about what mental retardation is in the field of psychology and disability.

A. Well, like so many things, I think, you know, the definition depends on what area you're coming from and when you're doing it. It's changed over the years. But it generally refers to well-below-average abilities to take care of personal needs, think things through, reason effectively, generally function. You know, sometimes it's just defined by a raw number on a test score; other times it's defined by what's called adaptive functioning, ability [137] to kind of get along and doing activities of daily living, live independently.

Q. Let's talk about that. You said a raw score on a test. Do you mean an intelligence quotient test, an IQ test?

A. Yes.

Q. What is IQ?

A. The best definition of IQ is IQ is what is measured by IQ tests.

Q. Okay.

A. There really is no good definition of it because it involves so many things. One of the oldest definitions is mental age over chronological age times 100, mental age being what someone is capable of doing and then relating that to what would be typical for someone of that age. So if someone is capable of doing things at about an 8-year-old level but they're 16, then their IQ would be roughly 50. So, it depends on what—you know, they're always related to people of the same age and what they should be capable of doing.

Q. So, IQ tests, tests that measure this version of intelligence, in other words, someone's intellectual function, have to be sort of given to a wide variety of ages to be what we would call normalized or normed out. Is that fair?

[138] A. Typically that would be the case, yes.

Q. Okay.

A. You know, the decade norms, you get norms for people from, you know, 16 to 20 and then another group, 20 to 24, something like that, but yes.

Q. Okay. And tell us about some of the tests that people use to measure this intelligence quotient.

A. Well, there are, you know, literally dozens. More than that, probably. Probably the best known historically would be the Stanford-Binet, been around a long time but then the Wechsler Scales came to be very popular and I started—David Wechsler was a psychologist that came up with intelligence tests and his tests were unique, I think, at that time because they involved measuring many different abilities, not

just, you know, vocabulary or something like that but they would have typically 11 or so different tests of—going to making up the composite score and the Wechsler Scales are still widely used.

The disadvantage of the Wechsler score is that they have always been oriented towards academic abilities and even today, you know, they don't give necessarily a good feel for what somebody is capable of doing in the real world. An exception to that might be a rocket scientist. I mean that literally. Someone with a high IQ would do better as a rocket scientist than someone with a low IQ. But other [139] than that, there's really not very much predictive value to it. I mean, you know lots of people in the Houston community that are very successful business men who probably don't have very high IQ but they—

Q. They might have average?

A. Yeah, they work hard and they're, you know, at least average or so and they do okay.

Q. But let's be clear. Even if there are flaws in whatever test method one uses, there are norms of intelligence, let's say an average, a point along a curve, if you would. People on the far side, or the high side might be better suited for some jobs but people on the low side of that with lower scores are going to have significant struggles in life, aren't they?

A. Yes.

Q. Okay. Let's talk about some of the typical testing scores and the meanings that one would see. For instance, let's take the opposite. What is the typical definition of a genius level IQ?

A. Probably 99 percentile and above; so, 140 IQ or higher.

Q. Okay. And what would be an average IQ score of any random person you saw on the street?

A. Well, average in IQ testing is statistically defined as 25th to 75th percentile. So, half of the [140] population falls in the average range. It equates to IQs of 90 to 110.

Q. Okay. So, an IQ of 105 would fall in the average range?

A. Yes.

Q. An IQ of 97 would fall in the average range?

A. Right.

Q. What is—and we should talk about this, too. Is there such a thing as an American Association for the Intellectual Disability and Development Disorders?

A. Yes.

Q. And does this group publish a handbook?

A. Yes.

Q. Does this group try to educate the large populace about the needs of what is now called intellectual disability, what used to be called mental retardation?

A. Yes.

Q. Okay. And what, if you know, what are their criteria for a diagnosis of mental retardation?

A. Well, they're emphasizing the need for more kind of practical measures of cognitive ability rather than relying so much on test scores but, you know, test scores are important but I think adaptive functioning is probably more important in their parlance.

Q. Okay. Tell us what adaptive functioning is.

[141] A. Ability to just do everyday things on your own and do them successfully.

Q. Such as balance a checkbook?

A. Balance checkbooks, but mostly, I think, plan ahead and decide, you know what your needs for food might be that week, how you're going to get them, you know. Financial management, of course, would be a big part of that. But just everyday things where you have to actually make a decision as to what you're going to do, implement that decision, see whether or not you're getting closer to the correct solution or not and if not, then modify your behavior. That's kind of what's involved in frontal lobe functioning.

Q. Okay.

A. It's called the executive functioning.

Q. And if I understood you correctly, the American Association for Intellectual Disability and Development Disorders believes that that should be a more practical emphasis than straight IQ tests; is that fair?

A. Yeah, they're emphasizing what as a neuropsychologist, to me, makes more sense, which is really neuropsychological functioning rather than just, you know, rote memory and simple things.

Q. For qualifying for federal disability benefits, just briefly, are those criteria similar for intellectual [142] disability?

A. They are. They have not changed in the 20 years I've been doing this and they still—they still rely pretty heavily on test scores but the basic requirement is that the person claiming disability demonstrate what would be a life-long history of well below average ability to live independently. And then once you've satisfied that requirement, then there are various

other ways of meeting the criteria. One would be to have a valid IQ with a standardized test such as the Wechsler Scale or the Stanford-Binet or Raven Matrices that equates to an IQ below 60 and if you got that, slam dunk, I mean, that's all you need to do. If it's in the range of 60 to 70, then if you have an additional limitation that would affect your ability to hold a job, such as attentional deficit or extreme academic skills disorder, inability to get along with people, all those things enter into whether or not you meet their standard for having another limitation. It could also be a physical limitation, you know, only one arm or something like that.

Q. That's not what we're talking about here?

A. No.

Q. Tell us what the Diagnostic and Statistical Manual-IV and new edition V are, please.

A. Well, those were published by the American [143] Psychiatric Association and they are—you know, initially they were meant to be an aid in helping clinicians talk about things in the same way. So they're supposed to be—if some—if one person was talking about a borderline personality, then there should be some sort of standard for that so if somebody else talks about that personality style, then we're talking about the same thing. So, that's why it was called a diagnostic and a statistical manual. I don't see much about statistics since it's mostly diagnostic. But the DSM is still kind of the guideline that's used by insurance companies and, for better or for worse, it's what we have.

Q. Okay. And I said the IV and the V; those are different editions of the same manual?

A. Yes, the V is the most recent edition.

Q. Okay. Let's work from back forward. Under the DSM-IV, what were the criteria for a diagnosis or determination of mental retardation?

A. It would be an IQ of 65 or below, I believe, maybe as much as 70 but it's somewhere in that range, 65 to 70.

Q. With the V, most of the tests have a certain margin for error?

A. Right, right.

Q. Would that be 5 points either way?

A. Yeah, right.

[144] Q. So a testing score of 70 would be—with a margin for error would qualify?

A. Yeah, it's right at the cusp.

Q. Okay.

A. Right.

Q. And what are some of the other criteria?

A. Difficulties in dealing with everyday activities, living independently. Shifting in the DSM-V puts much more heavy emphasis on practical abilities, everyday life.

Q. Okay. Would the ability to read and write be one of those abilities?

A. Well, that's in there but it's not strictly mentioned as—there is a section in the DSM-IV that gets at the ability to communicate, and reading and writing is one of those as well.

Q. It's a subsection of communication?

A. Right, right.

Q. Okay. What about academic achievement? Is that an area?

A. That's typically not even addressed, I think.

Q. Okay. Under the DSM-V or the DSM-IV?

A. I think in both. It's much more heavily weighted toward—the IV is more heavily weighted towards test scores and the ability to function independently and V is getting away from the test scores and looking at adaptive [145] functioning.

Q. Okay. Looking at preparing for today, would you—do you have a copy of the report that you did on this matter in front of you?

A. The affidavit?

Q. Yes.

A. Yes, uh-huh.

Q. Okay. Have you had a chance to review that?

A. Yes.

Q. Okay. Would you go over for the Court and the record what it was you did in preparing to testify on this case?

A. Well, I met with Mr. Moore.

Q. Okay.

A. That's one thing I did. And really did a very, very brief assessment because he had already been formally assessed so many times. I did a mental state exam just, you know, who are you, where are we, what time is it.

Q. Okay. Let's take you back for that.

A. Okay.

Q. You said that he had been assessed many times. Did you get a chance to review all the records, both the ones you'd reviewed in the '90s and other ones that were provided to you by my office and various other parties?

A. Yes.

[146] Q. Okay.

A. Many.

Q. Okay. And in reviewing those, did you find evidence of subnormal intellectual functioning?

A. Yes.

Q. Okay. And could you go over a couple of those, please?

A. Well, because of practice effects in IQ testing, usually the most accurate assessment is the first test that's done and I think in Mr. Moore's case that would have been the Slosson Intelligence Test, S-L-O-S-S-O-N, which was administered in 1972, and on that his IQ score was 57.

Q. Okay.

A. Then there were subsequent measures of—in '73 he was given the Wechsler Intelligence Scale for Children. That was the original form of that. The norms for that would have been in 1947 so they're way, way out of date and—

Q. Let's talk about that for a second. When you say "out of date," tell us what the Flynn Effect is.

A. Professor Flynn published a paper in—I think it was in 2009; I believe that's right—in which he had done a really extensive analysis of IQ test scores given

to people over time. And there's this phenomenon, you know, where every time a new Wechsler Scale comes out, then the [147] norms for that are different but if you give the same test to the same group of people, they'll do better on the previous version than they do on the current version.

And I don't know that anyone has effectively explained why that is. One theory is the population is just getting smarter or they're getting better at taking tests. Doesn't really matter. It's just a statistical anomaly that if you're using normative data that is more than ten years old, then the results you get can be 3 points off for every decade of obsolescence of the norms. So if a test was normed 25 years prior to using it, then the score that you get could be inflated by 8 points or so.

Q. Is the Flynn Effect generally considered to be a real phenomenon that is taken into account by forensic and other psychiatrists and psychologists?

A. Yes, an extensive analysis of that was done by U of H psychology department recently and published in a psychology journal and they verified Flynn's findings almost down to the decimal place. Yes. So whether or not that's accepted, that's not our area. I mean, that's the Court's area. But the Flynn Effect, I think, is well documented and it's not just for IQ tests. It's apparently for—extends to all neuropsychological measures, whether it's motor speed on a grooved pegboard test or whatever, there is this effect that people get better at those things over time.

[148] Q. Okay.

A. The population does.

Q. As a general norm?

A. Yes.

Q. Okay. Let me go back and preface this. You said he took a test in 1972.

A. '3. Oh, '72 was the Slosson, correct.

Q. Okay. And that IQ test was 57?

A. Yes.

Q. Okay. We talked earlier, and granted, that may vary from test to test, there could be some variance and test scores could be off by 5 points or more?

A. Right.

Q. But we talked earlier that a normal IQ would be between—I think you said an average IQ would be between 95 and 110?

A. 90 and 110.

Q. 90 and 110. So this would be well below the norm or average?

A. Yes, that would be below the first percentile, yes.

Q. Okay. And when you say "below the first percentile," you mean the bottom 1 percent?

A. Yes, out of a hundred people, 99 people would score better than that.

Q. Okay. And this would have been taken when this [149] individual was a young person, right, in school?

A. Right, yes.

Q. So there's every incentive to do well at those times, correct?

A. Yes.

Q. Okay. And every incentive and reason to try and do the best one can so that not only your parents are proud, your teachers are proud but you get into a good school.

A. Yes. There's no secondary gain for doing poorly.

Q. Okay. All right. Going back down, did you see some other IQ tests in that range?

A. I mentioned the WISC, Wechsler Intelligence Scale for Children, was given in '73. On that he earned an IQ score of 78 but the norms were way out of date. So, using the Flynn Effect, that would bring his score down to 70. Also was given the Bender Visual-Motor Gestalt Test, which is more of a visual spatial task but does have scores that generally equate with IQ and on that his score was 67, but again, the norms were so far out of date that using a Flynn correction, it would bring it down to a 56. In 1973, again, he was given the Draw-a-Person Test, which also put his—roughly—again, good enough—Draw-a-Person Test does not strictly give an IQ but there is a way of—you can get a percentile score from it and then work backward to get an IQ. And with Flynn's correction, that would put him in the [150] mid-60s. Then in 1989 he was given the Wechsler Adult Intelligence Scale-Revised, the norms for which would have been in 1979, so they were ten years out of date and on that his Flynn-corrected score would be 71. So, there are a lot of—there's a lot of scatter here, for one thing. They're different tests and they measure, to some extent, different skills.

Q. Let's take his—let's say, and forgive me when I use this term, let's take his best scores.

A. Okay.

Q. Let's take the 71.

A. Right.

Q. What percentile of the population scores a 71 on an IQ test?

A. That would be right around the fifth percentile, if I'm remembering right.

Q. Okay. And that was the last test, if I got you correct.

A. Maybe third percentile. Right. Third percentile, right.

Q. So, 95 to 97 people out of a hundred people would have scored better on this test?

A. Correct, correct.

Q. And that was his last test that you got that you saw on the report?

[151] A. Yes, he's been apparently tested more recently than that but I didn't review those.

Q. Let's just—yeah, let's just go with what you reviewed.

A. Right.

Q. And so, this is still well, well below normal intellectual function?

A. Well below average, yes.

Q. Okay. And did you get a chance to review some of the family history?

A. Yes.

Q. Did they indicate that he had strong problems adapting early in both social behaviors, academic realms, all those things?

A. All those, yes.

Q. Okay. Looking at this, when you examined him, what test did you administer, if any?

A. Because there was some suggestion in testing that he had frontal lobe damage and he had a history of multiple head injuries, so I think that's, you know, a reasonable assumption. I gave him something that I couldn't find in the records that anyone else had given him because it's a test that only neuropsychologists give, the Tinkertoy Test.

What is that? I think we all know what Tinkertoys are. It's a set of Tinkertoys. And you put 50 [152] of them on the table in front of the patient or applicant or claimant and the instructions are very simple. It says: Make something. You have—you can take as long as you want but you have at least ten minutes. Let me know when you're through. That's the only instruction given to the patient.

And then you note how many pieces they put together, whether or not they name what they have created, whether or not they have difficulty putting the pieces together, whether they persist in putting pieces together that do not fit, whether or not the thing is three-dimensional, can stand alone, and then it's scored. And it's used a lot in the head injury population. And a score below 7 generally equates with very poor likelihood of gainful employment and poor ability to live independently and also—and this is almost a pure frontal lobe test because there are—there's no structure.

And we've heard a lot of testimony today that Mr. Moore has done very well with a lot of structure in his life, being in the prison, but here's a test where there's no structure whatever, he's never seen the material before and he's just asked to do something with it and

he couldn't do it. He had a score of 1, which is the lowest score I've ever recorded and I've done a lot of testing of brain injury people. So that, I think, is further proof that he has had [153] some significant head injuries.

Q. So, I just want to make sure I understand this. Below 7 indicates severe impairment?

A. Yes, yes.

Q. From whatever cause?

A. Right.

Q. He scored a 1?

A. A 1.

Q. And lower scores are not good. It's not like golf.

A. No.

Q. Okay. And this is a similar, unstructured, albeit timed, test of motor visual skills, spatial appreciation, three-dimensional understandings and shapes, visual acuity and general intelligence, more or less.

A. I think most importantly is the ability to plan ahead, you know, have some idea of what you want to get out of this and take pieces to get to that goal. That's what it measures.

Q. Okay. Looking at this, did you also have a chance to review any other records in preparation either before or since your examination of Mr. Moore?

A. Such as?

Q. Have you reviewed any other reports from any other individuals?

A. Two, I believe.

[154] Q. Okay.

A. Yes. I probably made reference to them in here. Ms. Vitale.

Q. That's Gina Vitale, the licensed master of social work? She's a—

A. Right, right. And Dr. Garnett.

Q. That would be one of the psychologists that examined him prior to this hearing?

A. Oh, and also Dr. Williams-Anderson, a neuropsychologist.

Q. Okay. Is there anything else you'd like to note in your review and preparation for today or your testing or anything else?

A. Well, again, you know, we've heard a lot of testimony today of how well he has done in the extreme structure of his current environment and to his credit, he has—has found a way to do well in that environment and to enhance his ability to do academic skills. And I don't mean to discount that in any way but, you know, it's taken him, what? 30 years to develop skills that normally would be done in elementary school. So, although that certainly is to his credit, I don't know that that necessarily speaks to his having gotten brighter. I think he's just learned to do more tasks than he was able to do before.

Q. So, in looking at that, and let's put that in [55] perspective, it's taken him 30 years to do simple addition?

A. Right.

Q. It's taken him 30 years to learn to write a legible letter?

A. Right.

Q. And perhaps to read at an elementary school level?

A. That's my impression, yes.

Q. Okay. That does not indicate normal intellectual functioning to you.

A. Not to me, no.

Q. Okay. Is that because of the length of time it took him to master and achieve that basic level of skill?

A. Yes. And that certainly is not expected from average people in our society to take that long. He's a very slow learner and that kind of—we've heard that again and again, many repetitions to get him to learn something.

Q. And I want to put this in perspective also before we go on to a couple of other questions but in terms of intellectual ability or functioning, it's taken this long to get to a basic level, not an advanced level of intellectual functioning or proof of skills that indicate intellectual functioning?

A. Yes.

Q. So basic literacy and some numerical skills which can be practiced over and over again in a closed-cell [156] environment, literally.

A. Right, with very specific tasks that are the same from day to day, right.

Q. For instance, if you had a commissary sheet that was more or less unvarying for 14 years, you could eventually get to a place where you could add up those prices?

A. Right.

Q. And in terms of letter writing, if you practiced—sadly, Sister Mary Alice attempted to get me to practice cursive—but if you practiced cursive for hours and worked on it so that people would see the letters that you wrote and you would be proud of those letters, like a child.

A. Right, yes.

Q. Then that is not indicating normal functioning, is it?

A. No, in a—most of us have learned how to write cursive well before the age of 8 or so, 9 anyway.

Q. So a man who's able to do that at some point in his 30s or 40s and doesn't progress beyond that—

A. Well, again, to his credit that he's able to do it but we're comparing that ability to that of the normal population and it's clearly not normal to do that, take that long to do that.

Q. Now, we know that he had a difficult childhood.

[157] A. Yes, that's fair.

Q. Okay. Certainly that didn't help his intellectual development, did it?

A. No.

Q. But there's a difference between not being helpful and not having the tools to actually advance oneself, correct?

A. Yes.

Q. Okay. Does Mr. Moore fall in the latter, not having the tools?

A. I would say he's very limited in that area and that's certainly not helped any by the background,

with the very authoritarian father who ended up creating a very dependent sort of child that was very fearful.

Q. Okay. So, certainly nothing you would wish on any child?

A. Oh, heavens, no. It's a horrible background.

THE WITNESS: I'm sorry, Mr. Moore, it was. Just a fact.

Q. (BY MR. MCCANN) Okay. But that doesn't change the tool kit he started with, does it?

A. Exactly.

Q. Having reviewed these records over periods of years and having looked at other professionals' reports and having examined Mr. Moore yourself, do you have a clinical opinion [158] as to whether or not he meets the criteria for a diagnosis or a determination of mental retardation?

A. In my opinion, he would, yes.

Q. Thank you.

* * *

Q. (BY MR. PEEBLES) Dr. Borda, you had—when asked to define mental—or what used to be called mental retardation, you had indicated it was operating well below the average intellectual ability and then you said sometimes it's evaluated using a number, sometimes it's based on adaptive functions but it's not really one or the other, right? There has to be a link between those two, doesn't there?

A. It depends on what definition you're using.

Q. So then are you suggesting there's not a commonly accepted method of evaluating someone and

determining whether they're mentally retarded right now?

A. I think it varies from state to state and from institution to another. I think a numerical kind of IQ testing is still very important but I think more important is adaptive abilities.

Q. So, if it's a little bit subjective based on the [159] examiner and the way the examiner wants to approach it, then it's fair to say that there may be other neuropsychologists such as yourself that would reach a slightly different conclusion than the one you did?

A. I can't speak for them.

Q. What exactly is standardized adaptive testing?

A. Well, over the years there have been several tests of functional daily abilities, such as the Vineland, that look at different areas of ability to care for self, interact with others, take care of your own basic needs and there are numerical scores that are derived. These can either be done from direct interview of the person in question or by secondary information from family members or teachers and then you can end up with a global assessment of functioning score from that.

Q. Let's do this. Can you walk me through your personal—not what you relied on from someone else, what they did, but what have you personally done with Mr. Moore as far as your interactions with him and any tests you have administered to him ever since, you know, as long as you've known him.

A. Well, I've only actually known him for about a month. I'd never met him before. I've only looked at his records.

Q. Okay.

[160] A. So, what part of that do you want me to answer?

Q. So, prior to one month ago, you'd never met him; you'd never administered any tests yourself?

A. That is correct.

Q. And a month ago, you saw him, I presume, at the Polunsky Unit?

A. No, very near here at the Harris County Jail.

Q. Okay. What did you—what tests did you administer to him a month ago?

A. I gave him part of the Mini-Mental State Exam, which is really just very basic stuff, you know, who are you, where are we today, what day is it, some—

THE COURT: I'm sorry. What's that called?

THE WITNESS: Mini-Mental State Exam.

THE COURT: Thank you. Sorry. I just couldn't hear you.

A. Asked him to remember three words and I told him I'm going to ask you later what they were and then repeated them several times, made sure that he could repeat them back. So, I mean, he heard them. And he was able to do that. And maybe 20 minutes later I asked him again what those words were; he gave me one of them. Not good.

I gave him the Raven's Coloured Matrices test, which is very similar to the part of the Wechsler Scale that involves matrices, so he may have already been exposed to [161] things like that and that can give a general index of intellectual ability.

Q. (BY MR. PEEBLES) If I can interrupt you just for a second.

A. Yeah.

Q. You mentioned he may have been exposed to something like that and it sounds like you're suggesting that practice effects might come into play. Is that what you mean by that?

A. Oh, very definitely, yes.

Q. But doesn't—now that—American Association on Intellectual and Development Disabilities, which is formerly the AAMR, right? That's kind of the standard—commonly accepted group for mental retardation across the country, isn't it?

A. I believe so, right.

Q. And the DSM-V, and formerly the DSM-IV is the standard, you know, manual resource guide that is commonly accepted across the community, right?

A. Yes.

Q. Don't these organizations say that practice effects are nonexistent after seven years?

A. It depends on the test but when—if—and it also depends on how many times the test has been given. If you give the Wechsler test in every one of its versions, you [162] know, like, every three or four years, there's an obvious practice effect which may account for as much as two-thirds of a standard deviation on repeated measures.

Q. Well, when you went and saw him a month ago, he hadn't really been subjected to any kind of meaningful testing for over a decade, right?

A. I suppose that's correct.

Q. And so, really, practice effects at that point wouldn't enter into your area of concern, would they?

A. I think, you know, it's always a concern, which is why I picked the Tinkertoy Test because he'd never seen that before and also because it's a test of frontal lobe ability.

Q. Frontal lobe, does that imply brain damage?

A. Well, it's a test of frontal lobe functioning. Whether or not that's due to damage or just developmental lack of abilities in that area, it doesn't really matter. It's just—it's a test of executive functioning, which depends on the frontal lobe. I see it most commonly in people with head injuries.

Q. If someone has a problem with the frontal lobe and their executive functioning, say, isn't up to par, that's a permanent condition, right?

A. Usually.

Q. It's not something that's going to be reversed, improved in the future?

[163] A. Well, again, it depends on the cause. I mean, you can get a frontal lobe dysfunction from exposure to various chemicals and drugs but that could go away; but if it's, you know, due to a stroke, you might get some improvement and that—over time much of it will be permanent.

Q. The Tinkertoy Test that you chose to administer, do you know what the validity range on that test is?

A. I don't.

Q. Or the specificity of that test?

A. It's just generally accepted to be a test of frontal lobe functioning and I said it doesn't strictly equate to IQ. It's more of a practical measure of ability to plan ahead, think things through, work towards a goal.

Q. And you mentioned that you essentially take some Tinkertoys, put them in front of him, tell him, Build anything.

A. Yes.

Q. You've got at least ten minutes but you can go on forever if you want.

A. Yes, right.

Q. Right? So when you were—I think there was a question that was a timed test. It's not really a timed test. Somebody has as much time as they want.

A. You're quite right. You're very sharp. Picked up on that.

[164] Q. Well, thank you. Did—was Mr. Moore able to build anything with those Tinkertoys?

A. He used a total of eight pieces and basically made a square. That was it.

Q. Is a learning disability the same as mental retardation?

A. Not the way it is typically used. Again, mental retardation will be associated with difficulty learning but usually the term "learning ability" is specific for difficulty learning either verbal or nonverbal material in the absence of a global impairment of intellectual functioning.

Q. So, they could exist together but they aren't really linked to one another? Is that what you're saying?

A. That's a hard one to answer because people with mental retardation will have difficulty learning things but by definition, learning disability is something that is present in the absence of global impairment of

intellectual disability. So, although, yes, MR will be associated with, difficulty learning, a learning disability, per se, is not the same thing.

Q. Is it possible that other factors can affect someone's ability to learn, such as emotional disturbances that they're going through?

A. Sure.

[165] Q. Environmental conditions?

A. Yes.

Q. Like a abusive household, right?

A. All those things. Just having parents that are not intellectually curious can affect learning.

Q. In the documents that you reviewed, did you see an evaluation done when Mr. Moore was 13 that said he was likely a child who could learn; he just hasn't been taught?

A. I did not see that.

Q. Are you familiar with whether anyone besides yourself has diagnosed Mr. Moore as being mentally retarded?

A. Well, those people I just mentioned.

Q. They actually diagnosed him as being mentally retarded?

A. That was the conclusion that they had arrived at. Whether or not you call it a diagnosis or whether or not he just fits in that category, I don't think, is really much of a distinction.

Q. In your interaction with Mr. Moore, you never gave him a full-scale IQ test?

A. No, I did not.

Q. Can depression affect somebody's scores on an IQ test?

A. Typically it will affect the nonverbal tasks more because they're timed and depression can cause people to [166] think more slowly so they will do more poorly. The simple answer is, yes, IQ scores can be suppressed to some degree by depression.

Q. And about the—let's take death row as an example. That's probably a big motivator for someone to try to maybe alter their score on an IQ test.

MR. MCCANN: Objection, calls for speculation, since I don't believe that our witness has ever been to death row or knows anything about it.

THE COURT: I'm going to overrule that. I think you can ask him that question as far as his knowledge goes.

A. So, again?

Q. (BY MR. PEEBLES) Could the specter of facing the death penalty affect motivation or depression and therefore affect performance on mental health tests?

A. Well, it certainly could but, you know, over the past 30 years, he's been tested several times and the scores still vary around the upper part of—

Q. I understand—

A. —mild MR.

Q. Could depression—I'm sorry. Could the specter of the death penalty affect motivation or depression and therefore affect the results of a mental health examination? Yes or no?

[167] A. It could, sure.

Q. You suggested that Mr. Moore showed poor adaptive skills as an adolescent. There are plenty of people who have poor adaptive skills as adolescents that don't fall into the mental retardation category, right?

A. Sure.

Q. Like homeless teens, for example?

A. Right.

Q. They're thrust out of their house and they don't have those adaptive skills to live and they live in makeshift shelters and things like that, right?

A. Right.

Q. It certainly doesn't mean that if somebody hasn't been taught skills that they're automatically mentally retarded.

A. Could not agree more.

Q. Doesn't the fact that when Mr. Moore was a kid he mowed grass for money and hustled pool suggest that he had some adaptive skills?

A. I'm not saying he had no adaptive skills. I'm just saying that they were probably below average for someone of that age.

Q. Money skills, the knowledge that I need to make money and going out to get a job to make money, that would indicate adaptive functioning, wouldn't it?

[168] A. Well, I haven't seen anything that indicated whether or not this was something he was just told to do or whether or not he had the idea that he wanted to make money to buy something and the way to do that was to go, you know, do some part-time work and make money, I don't know.

Q. Did you ask him any of those questions when you saw him last month?

A. No, no.

Q. The—kind of the behavior of this very crime indicates some adaptive skills, doesn't it?

A. I really don't know much about the specifics of the crime. My impression is that he got kind of dragged along on this by people that he was afraid to say no to. I don't think it was as much of a planning involved in this.

Q. Have you read the confession that Mr. Moore wrote?

A. No, I've not.

Q. When he was arrested? If, hypothetically speaking, it says, We drove around, we talked about a place to rob—

MR. MCCANN: Objection, Your Honor, since, as admitted, he hasn't read the confession, questioning from an item that he hasn't read seems both unfair and speculative.

THE COURT: Overruled.

Q. (BY MR. PEEBLES) If that confession suggested that he was with two other people and they planned this in advance and rode around in a car, that would indicate some [169] adaptive behavior and some planning and forethought, wouldn't it?

A. Again, we don't know who was doing the planning here, whether or not Mr. Moore was just, you know, along for the ride or whether or not he was involved in a planning process, I don't know.

Q. If Mr. Moore wore a wig during the offense, would that indicate some adaptive skill?

A. I have no idea. Maybe he was just given the wig, you know, put this on. Again, we don't know. I wasn't there.

Q. Well, if the testimony said Mr. Moore wore a wig, concealed a shotgun in a shopping bag so it, you know, it wouldn't be seen, even shaved his head after the offense before he was arrested, would these things indicate some kind of forethought or planning, you know, and intent to avoid being caught?

A. I can see your point. Could be.

Q. Have you read Mr. Moore's testimony from his trial?

A. No.

Q. If, for example, Mr. Moore had taken the stand and was questioned by the prosecution and questioned by the defense and listened to those questions, responded in manners that would be appropriate given the context and circumstances, that would indicate—

[170] MR. MCCANN: Objection, vague.

THE COURT: Can we let him finish his question?

MR. PEEBLES: I'm sorry?

THE COURT: Go ahead.

Q. (BY MR. PEEBLES) I'll start over.

If the—if Mr. Moore sat on the witness stand just like you in his trial and was questioned by both lawyers, listened to the questions, answered appropriately given the circumstance and the context, that

would indicate an ability to listen, assimilate information and respond appropriately, wouldn't it?

A. It would seem to be, yes.

Q. You have also seen some advances that Mr. Moore has made since he's been in prison, haven't you?

A. Have I seen them?

Q. Yes.

A. I've heard them reported. I haven't—again, I've only seen him once.

Q. Okay. So, you don't have any personal knowledge of whether his ability to read or write has increased dramatically since he's been in prison?

A. No.

* * *

[171] Q. (BY MR. MCCANN) Let me clear up a couple of things. In '72, Mr. Moore would have been 13. That's when he got the first IQ test of 57?

A. Right.

Q. Is that correct?

A. Yes.

Q. Okay. Would he have been under the specter and depression of death row at that time?

A. No.

Q. Okay. In fact, given the history that has been given by the family, he would have had every incentive to do well on such a test so that he would not be beaten by his father, wouldn't he?

A. I would think so, yes.

Q. Let me also sit there and go through. After correcting for Flynn Effect, is there any IQ test that indicates even normal or average intellectual functioning?

A. None.

Q. Okay. And by the way, the first test was given when he was 13, if he was born in '59 and he was taking it in '72, right?

A. Right.

Q. So, that would have been well before the age of 18 [172] correct?

A. Yes.

Q. And one of the criteria in the old DSM-IV used to be onset of subnormal intellectual functioning prior to the age of 18, wasn't it?

A. Correct, yes.

Q. Okay. By the way, I apologize for this because I believe I screwed up my question but under the old DSM-IV, the—and the old American Association for the Mentally Retarded, the normal accepted IQ range of score would have been somewhere around 70 with a 5-point plus or minus and I think I phrased it incorrectly to you that it was 65 plus or minus 5; it's actually 70 plus or minus 5, so a score between 65 to 75 could actually qualify one as retarded, correct?

A. Yes. It's right on the cusp of borderline to retarded.

Q. And I guess I wanted to go through some of these things just real quickly as well. Someone who is suffering from an intellectual disability, are they typically suggestible in your experience?

A. Yes.

Q. So if they're told what to do, they do it?

A. Yes. That's one way they've learned to get by. In Mr. Moore's case, to avoid getting punished.

[173] Q. Okay. Okay. And would it be irrational for someone to be told by someone else planning a robbery that, Hey, put this wig on and put this gun in a bag; you're going to come with us.

A. At the risk of doing myself some harm, I'd say that's the way I'd do it.

Q. We're not suggesting you have experience in this area.

A. Right.

Q. We're just saying does that seem unsensible to you?

A. No, it does not.

Q. Okay. And even if one of the ideas was your own, if you put a gun in a bag to carry it, is that irrational?

A. No.

Q. Does it indicate actual planning or just putting it in something, you can carry it?

A. It could be either. I don't know.

Q. Okay. But let's be clear. This is not the Brinks job that was pulled off.

A. Right.

Q. Okay. In terms of planning, this was not a blueprint that was analyzed by someone. That was not a safe-cracking job. This was not anything that your

normal 7- or 8-year-old couldn't have come up with in ten minutes?

A. I think that's probably correct.

[174] Q. Okay. Doctor, look at this from your experience. You've interviewed how many folks and assessed them for federal benefits for intellectual disability?

A. I don't actually evaluate people for disability. I evaluate the case file.

Q. Okay. Fair enough. How many of those have you evaluated? Over a hundred?

A. Oh, yeah, well over.

Q. Over 200?

A. Probably, yeah.

Q. Okay. You've been practicing how many years?

A. Since 1985. So, you know, getting close to 30.

Q. Okay. And you've examined hundreds, if not thousands, of patients yourself, correct?

A. Yes.

Q. Okay. How many times have you given that spatial perception test, the one you call the Tinkertoy Test? Over 50?

A. Yes.

Q. Okay. Over a hundred?

A. Probably not because I wouldn't use it with the entire population, just those that have had a head injury, typically.

Q. Okay. So, out of 50 or more people with severe enough head injuries that they're applying for benefits, Mr. Moore got the lowest score?

A. In my experience, right.

Q. Okay.

* * *

[175] Q. (BY MR. PEEBLES) With respect to that Tinkertoy Test, did you do any kind of effort testing or malingering testing before you gave that test?

A. There really is no good effort or malingering test for people that are not of average IQ. Most of them involve memory, so if they really do have a memory problem, they're not going to do well, like on the Test of Memory Malingering. Did I give any? No, because typically they're not normed for that population.

Q. However, when you go into the test, you don't know what his IQ is, right, so you can't assume that it's too low to administer a malingering test, can you?

A. Well, because of all the records I reviewed, I had a pretty good idea. But also just the way the person approaches the test is a—I mean, for someone with, you know, 30 years of clinical experience, you get some feel for [176] what people do when you give them tests and they just look out the window and don't make eye contact and, you know, don't have any interest in it, that's pretty obvious but if they're really seeming to follow instructions and try, I don't think that's much evidence for malingering.

Q. You're not saying that effort testing is inapplicable to folks that are mentally retarded, are you?

A. Not saying it's unapplicable. It's just I think in a forensic setting, the use of tests that have not been normed for people appropriate to that are specious.

Q. What about somebody who's borderline?

A. I don't know of any studies that have looked at that. I don't know.

Q. So then—okay. This Slosson IQ test that you talked about in 1972 that he scored a 57 on?

A. Yes.

Q. That's a group test, isn't it?

A. I believe so, yes.

Q. It doesn't have a lot of validity behind it, does it?

A. It's not one that's widely used. I think the Wechsler is more commonly used or the Raven Matrices, which is also group administered.

Q. Mr. McCann had asked you about someone like Mr. Moore, for example, being very suggestible. Do you [177] remember that?

A. Yes.

Q. Because of, I guess, the implication is diminished mental capacity renders one more suggestible than others to the point that they're likely to just do whatever they're asked, right? Is that what you meant?

A. Yes.

Q. And I understand you don't know much about the facts of the case but let's assume hypothetically that someone was arrested and police tell them, I want you to sit down and write a piece of paper out, you know, as to your involvement in this, and they said,

I'm not doing that, no way, that would be the opposite of being suggestible, wouldn't it?

MR. MCCANN: Objection, relevance and speculation.

THE COURT: Overruled.

MR. PEEBLES: It's a hypothetical—thank you.

THE COURT: Yeah.

Q. (BY MR. PEEBLES) Wouldn't that be the opposite of someone who's suggestible and does what they're told?

A. Ask that again. I lost track somewhere in there.

Q. Okay. If someone is suggestible, as you put it, due to low mental functioning and they're likely to simply [178] agree or do whatever that they're asked, then wouldn't you expect if they were arrested and the police said, I need you to write this statement as to your involvement, that they would do it because they're suggestible?

A. I would expect that they would.

Q. And so the converse would be if they said, Absolutely not, I'm not signing anything, would be the opposite, it would be contrary to being suggestible, right?

A. Especially if they also said, Not without my attorney being present.

Q. What about somebody that said, Nobody that's ever been to prison before would ever sign a confession? Would you expect something like that to come out of Mr. Moore's mouth?

A. No.

Q. And you've admitted that you didn't know very much about the case.

A. Yes.

Q. Mr. McCann said this isn't a complex case. It's not a bank robbery or whatever—however we put it. But the fact of the matter is if I sat here and said Mr. Moore was arrested after he fled to Hawaii, you would not know if I'm telling you the truth, would you?

A. No.

* * *

[179] Q. (BY MR. MCCANN) The Slosson test—I thought we had discussed this, Doctor—isn't that an individual test, also? It's an individual test that can be administered?

A. I think, like the Raven, it can be done either way.

Q. Either way, it's not a test that you would administer now?

A. I've never even seen the test. No, it's not one I would use.

Q. Okay. But it did it was given well before 18 and did show 57?

A. Yes.

Q. Thanks.

* * *

Neuropsychological Associates
13656 Breton Ridge Street, Suite F
Houston, TX 77070
(281) 890-7776 voice (281) 890-7785 fax
www.neuropsych-associates.com
Shawanda Williams-Anderson, Ph. D., HSPP

FORENSIC NEUROPSYCHOLOGICAL EVALUATION

Name: Bobby Moore

Ethnicity: African American

Date(s) of Evaluation: 11/22/2013
12/06/2013
12/19/2013

Medical Record/ID #: CAUSE NO. 314483-A

Gender: Male

DOB: 10/19/1959

Reason for Referral:

Mr. Bobby Moore was referred for a neuropsychological evaluation by his attorney and legal team to help determine his overall level of functioning. Specifically, the evaluation was conducted to determine the possibility and effects of organicity and/or acquired brain injuries.

Assessment Tools:

Unstructured clinical interview with Bobby and his family,

Review of records,

Mini-mental Status Exam (MMSE),

Rey Complex Figure Test (RCFT),

Symbol Digit Modalities Test (SDMT),

Trails A& B,

Hooper Visual Organization Test (HVOT),

Controlled Oral Word Association (COWA),

California Verbal Learning Test-II (CVLT-II),

Delis-Kaplan Executive Functioning System (DKEFS)

Wide Range Achievement Test-4th edition (WRAT-4)-math subtest,

Wechsler Adult Intelligence Test-IV (WAIS-IV)-math subtest.

Behavioral Observations:

The entire evaluation with Bobby was conducted in the contact visitation room of the Polunsky Unit (unless otherwise indicated), where Bobby is currently being housed. The testing room contained a round table and 3 chairs. A corrections officer was posted on the opposite side of a double-paned, plexi-glass window. Bobby was escorted to the testing session by 2 corrections officers. Bobby wore shackles on his wrists and ankles, but was able to ambulate to the table with little assistance. His wrists were released to allow him to give written responses.

Bobby presented in a white, standard issued jumpsuit. He appeared his stated age. He was likely slightly above average height and within his average or ideal body weight. He was appropriate and cooperative throughout the testing. His demeanor and presentation were respectful at all times, thus rapport was easily established and maintained. His eye contact was somewhat inconsistent. He reported that he used reading glasses for corrected vision, but did not have them at the time of testing. However, he reported

being able to see all test stimuli accurately and without incident. His mood and affect were within normal limits for the situation, although he seemed somewhat shy and reserved. His thought processes were coherent, and he did not appear to be attending to unseen external stimuli. He denied the presence of auditory or visual hallucinations.

His speech was minimal and at a lowered tone. He answered all questions posed to him. However, he spoke in short and discrete sentences and had to be asked to expound on his answers. His speech lacked a level of complexity, skill and proficiency that would be expected for his age. For example, when asked if Bobby was short for another name, perhaps Robert, he said, "No, Bobby." He seemed baffled and completely unaware that Bobby is often a nickname for Robert. He also displayed some deficits in receptive language as test instructions had to be repeated on several occasions.

Bobby was made aware of the purpose of the evaluation and given the opportunity to ask questions. His attention and effort were judged to be good and he seemed to answer all questions and test items openly and frankly. He was able to attend to and follow all instructions to completion; although prompts and redirection may have been needed. The testing session, including the initial diagnostic interview, occurred across 4 hours. Bobby's family was also interviewed on a separate and subsequent occasion for approximately 2 hours. The family provided insight into Bobby's course of development. Lastly, Bobby's computation skills were assessed on 12/19/2013 after he was relocated back to Houston.

Background/Social History:

Bobby Moore is a 54-year-old, right-handed African American male. He was able to give an account of his psychosocial history. He reported that he was born in Coushatta, LA, and raised in South Houston. He stated that he moved to Houston with his family when he was approximately 3-5 years old. He reported that to the best of his knowledge there were no complications surrounding his birth, but recalled that he was a "sickly" child. He could not elaborate or give definitive diagnoses. He reported that he reached most developmental milestones at the appropriate ages; with talking being the exception. He stated that he had to "train [him]self to talk" when he was 18-19 years old. He also reported that he had difficulty with expressive and receptive speech as a child and characterized his difficulties as a speech impediment. The family acknowledged and confirmed that Bobby had speech difficulties and that they often had to translate and assist him with communication.

Bobby reported that he was born the fourth of 9 children. He reported having an abusive and tumultuous upbringing. He stated that his father was an alcoholic and was physically abusive to the family. Discussion with his family revealed constant and severe abuse. Mrs. Alice Moore, the maternal aunt, stated that Bobby's father was violent and abusive towards her sister early on. She stated that she was not always welcomed in the Moore home because of her disdain for the father and his control over the family. However, she reported that she would often have the female siblings stay at her home and the girls considered it a refuge. Mrs. Alice Moore stated that she was unaware of the severity of the abuse until a neighbor brought her sister to her home, after that neighbor found her

sister bloody and beaten in a ditch. The siblings confirmed this account and added that Bobby received an unequal amount of the father's abuse. It is unclear to why that would be, but the siblings and aunt hypothesized that it may have been because of Bobby's slowed intellect and impoverished communication. The sister remarked that the father would often give Bobby a command/directions and Bobby likely had difficulty discerning what was being asked of him and would remain still. The sister reported that their father would hit Bobby and yell, "Do you hear me?," and continue beating Bobby although he still had not gained full understanding of what he was being asked. He reported that his father died of cancer 13 years prior, while his mother suffered a cerebrovascular accident approximately 2 years ago. Bobby never married or fathered children.

Academically, Bobby historically demonstrated delays and problems with learning. He reported that he was aware of his difficulty to learn and had a difficult time in school. He stated that he [I] "would just sit there" and hoped no one would notice he was not able to learn the information. He recalled being retained in 1st grade and being socially promoted every grade afterwards. After being retained, his younger sister and a cousin became his classmate and would assist him with classwork/homework. The cousin, Ms. Parneva "Shirley" Williams, was present during the family interview and recalled not only helping Bobby with homework, but assisting him to understand the classroom rules, concepts, and navigating the school. Records indicated that Bobby's intellectual capacity was constantly questioned by school personnel and often tested. His scores typically fell in the borderline capacity or mentally retarded/deficient ranges. It is unclear if Bobby ever received formal special

education services, as records indicated that he was "allowed to draw" while in the regular classroom setting. He reported having 7 years of formal education. He stated he was essentially unable to read or write until he received assistance from other inmates while incarcerated.

He reported being self-conscious about his speech, and slowed learning. He stated that his deficits were apparent to others and that in approximately 5th grade, his teacher at the time would arrive to school early and stay late to tutor him. He also recalled that the teacher worked with him in her home and attempted to take him home to inform his parents of his level of difficulty and let them know of possible services, and was either not allowed in the home or no adults were present. Bobby stated his teacher made at least 5 attempts to contact his parents.

Socially, Bobby described himself as being shy and reserved. He stated that he was often made fun of in school by his peers and his older siblings had to protect him. His siblings corroborated his statements and added that 1 or more siblings would always be with Bobby for safety and guidance. Bobby stated that one of his few friends in school "had problems" and would follow him around. His family relayed that the friend was deaf and mute and that Bobby saved the friend from drowning after bullies pushed him in a swimming pool. The family explained that Bobby was "timid, gentle, and simple." They stated that he was embarrassed by his deficits and did not interact with many people, but was gifted when interacting and training animals.

Reportedly, he often had many loyal pets that he cared for and found solace. Additionally, Bobby participated on his school's swim team. When specifically

asked about his ability to train animals and swim, he was able to relay that he tended to learn by watching people rather by formal, verbal instruction. He stated that he learned to swim by watching people at a neighborhood pool; and learned to train animals by watching an older male neighbor train his dog.

Bobby reported that he was thrown from the family home when he was approximately 13 years old. He recalled the precipitating incident was that his father was physically abusing his mother and he intervened. His father discharged him from the home for standing up to him and questioning his authority. Bobby stated that he lived on the street from ages 13-17. His family relayed that Bobby attempted to return to the home on at least 3 occasions, but he was forced away by his mother who feared both their safety and retaliation by the father. Bobby further relayed that he was allowed to sleep in the back of a neighborhood pool hall. He stated that he would play pool, do odd jobs for others, and cut grass for money.

Bobby has been incarcerated since the age of 19. He was convicted of Capital Murder charges and sentenced to death. He reported that he was the youngest of 3 perpetrators involved in a robbery where the store clerk was killed. Bobby explained that he was accosted by 2 men; one of which he was somewhat familiar, as the man had a notorious reputation in the neighborhood. He stated that the men informed him that they were aware of a way he could "make real money." Bobby reported that he refused to participate when the men initially approached him, and they proceeded without him. On the day in question, Bobby stated that the men had plans to rob a convenience store. The store clerk "went for" the gun he was holding during the robbery, and as Bobby retracted

the gun to place it out of reach from the clerk, the gun forcefully hit the wall and discharged. He recalled the year of the incident as 1979. He also recalled that his case was overturned in 1999 and that a new trial was ordered in 2000.

Medical/Psychiatric History:

As mentioned earlier, Bobby reported being a "sickly child." He also suffered several traumatic brain injuries. Some injuries were secondary to the frequent beatings he sustained from his father. Specifically, there was an incident that the family recalled where Bobby was hit with a chair by his father and sustained significant injury. Additionally, there was an incident where there were symptoms of post-concussion syndrome. Bobby discussed that the incident occurred when he was in 5th grade and due to integration was bussed to a predominantly Hispanic school. He stated that the neighborhood children were often taunted and the bus attacked. He reported that a young schoolmate threw a brick at his school bus and the brick hit him in the head, just above the right orbital bone of his eye. He reported a brief interval of loss of consciousness, excessive bleeding, and decreased vision in his right eye. He stated that he was required to wear a patch on his right eye for approximately 2-3 months. An overt and noticeable scar was visible above his right eye.

On a separate occasion where brain injury was probable, Bobby reported falling when attempting to "jump a train." He stated that he was trying to pass between the cars to get to the other side while the train was moving a slow speed. He reported pushing away from the train and falling backward as the train suddenly increased its speed. He reported a protruding contusion on his forehead. He stated that he

returned home with symptoms of dizziness, headache, some nausea, and a swollen forehead. He reported that his siblings cared for him when he returned home. He noted the malformation on his forehead that is likely a crude and untreated suture line from a cracked skull.

Test findings:

Cognition—

Bobby was not administered a full measure of intellectual capacity during the current evaluation. He has been exposed to many such tests since approximately 1973 (age 13) and practice effects may preclude an accurate estimate. However, a review of available records which included intellectual quotients, and other test findings from the current evaluation, indicated that Bobby likely falls in a deficient range of measured intelligence. This contention is based not only on the confidence intervals of previous scores, but his lack of adaptive skills. Additionally, a large amount of records were available for review for the current evaluation, including findings from prior testing, and test results with interpretation.

It could be argued that Bobby was able to navigate his surroundings and live independently on the streets. However, careful analysis revealed that Bobby was not instrumental or solely responsible for his survival during his years of homelessness. More likely than not, he functioned at the mercy and grace of others (i.e., being allowed by the pool hall owner to sleep there and play pool for money; neighbors having him cut grass), rather than developing the means himself. Additionally, when he did operate without the influence or input of significant and trustworthy

others, he came up with maladaptive solutions with failed attempts (i.e., robbery).

Lastly, Bobby's lack of developmental prowess cannot be ignored. A child that required the level of assistance from family and friends to communicate, navigate his surroundings, and remain safe is not likely to become self-sufficient simply because his circumstances dictate such. That is, if Bobby required help and guidance before being expelled from his parent's home, he would require some level of adaptive/functional care when living a transient lifestyle. Thus, his adaptive abilities are also judged to be deficient.

Verbal Memory—

The CVLT-II is a test of verbal memory that requires the examinee to recall a list of 16 words that are repeated across five trials. The examinee is asked to recall the words after a brief delay and again after 20-25 minutes. Bobby was able to recall as many as 6 of the 16 words from the original list after the fifth trial. This performance is classified as mildly impaired. He tended to somewhat benefit from exposure and acquired slightly more words across trials; however his range of acquisition was small. That is, he recalled between 4-6 words, which varies by only 2 words despite multiple trials. This may suggest a limited capacity to store information. Following a brief delay, Bobby was able to recall 6 of the words from the original list. This performance is classified in the low average range. However, when given cues he lost several words and could only recall 1 word. After 20 minutes, he could again free recall 6 of the 16 words. When cued, he again recalled 1 of 16 words. This performance is in the severely impaired range. Most individuals perform better when given cues about

what they have learned. In the case of Bobby, it seems that he did not fully understand what the categorical cues meant, and did not acknowledge those words. Thus, cueing did not seem to help his recall abilities. Overall, Bobby has fairly intact memory skills, but may be only able to retain a definitive amount of information, as opposed to being able to employ strategies to recall beyond his limits. His scores would suggest that he has a reduced capacity to learn.

Visual Perceptual/Visual Memory—

Bobby was administered the RCFT. This test requires the examinee to copy an abstract figure with a visual stimulus card present. The RCFT was administered to assess visual processing and perceptual abilities. Bobby was able to complete this task with no errors. However, he completed the task slowly and precisely. He tended to want to have the aspects exact and precise. He approached the task in a piecemeal manner, which is to perceive small aspects of the gestalt or entire stimulus. This approach is typically taken when the examinee is overwhelmed by the stimulus complexity or cannot process the large amount of stimuli/information at once. He tended to use dark, distinct sketch lines as if he were unsure of himself and had to check the stimulus card for accuracy. He completed the task in 412 seconds, which is very slow compared to his normative group. His scores fell in the borderline-moderately impaired range; not because of perceptual deficits (he received full credit for visual aspects), but because of the additional time required to complete the task.

Bobby was also administered the HVOT. The HVOT is a measure of visual organization and mental rotation ability. The examinee is to view 30 items that are cut into puzzle-like pieces and determine what the

stimulus might be if put together. Bobby was able to complete this task with 3 errors. The errors were common misperceptions and did not represent a gross error in perception. His overall score fell in the average range (T=43).

Processing Speed—

Trails A is a test of scanning and visual-motor processing speed. The subject must draw lines to connect consecutively numbered circles as quickly as possible. This task measures processing speed and requires visual scanning, intact fine motor skills, and visual perceptual skills. Bobby's performance is classified as severely compared to individuals his age. He was able to complete the task in 97 seconds, with no errors. This is slowed and falls in the deficient range (T=25).

Trails B is a test of visual-motor scanning, divided attention, and cognitive flexibility. Similar to Trails A, the subject must draw lines to consecutively connect alternating numbers and letters as quickly as possible. Trails B is more complex than Trails A. Bobby required 303 seconds to complete this task (T=27). Bobby's performance was classified as severely deficient when compared to individuals his age. Although he completed the task, he made 3 errors when he could not shift from one cognitive set while maintaining the order. This performance suggests that Bobby may make errors when he has to process differing and/or complex information quickly.

The SDMT is also a measure of cognitive processing speed. The SDMT requires visual scanning, visual discrimination, visual memory, fine motor skills, and cognitive speed. The SDMT employs two response trials consisting of written and oral response modes.

The examinee is required to write a number associated with a novel symbol, with visual stimulus cues being continuously given. Bobby completed 32 of the 110 items, when writing responses. This score is in the borderline impaired range. He did not make errors when completing this task, but was slow when doing so.

Language—

Because Bobby exhibited some difficulty with verbal fluency and word-finding during interview, and acknowledged long-term deficits in this area, a full test of verbal fluency was administered. He was administered the C.O.W.A. The C.O.W.A. entails giving verbal responses that begin with a particular letter within a 60-second time frame. This procedure is repeated across 3 trials with differing letters. Bobby was able to produce a combined total of 17 words. He gave as many as 7 words beginning with a specific letter, and as few as 4. His overall raw score fell at the 1st percentile and in the deficient range. This score is similar to scores of verbal fluency produced on the DKEFS (see next section). If Bobby's language scores are corrected for his lack of education and his grade attainment, his score is then at the 11th percentile and in the low average range.

Executive Functioning—

Bobby was administered selected subtests of the DKEFS test to assess several areas of executive functioning abilities. When interacting with Bobby, these areas seemed to be the most impoverished and can be subtle and difficult to detect. On the DKEFS, he demonstrated great difficulty on higher order tasks such as reasoning and verbal fluency. He was administered the Verbal Fluency tests and Twenty

Questions Test. He scored in the moderately impaired range on each task. The verbal fluency subtest required him to verbally give words that were associated with a stimulus, such as animals, in an allotted time. The Twenty Questions subtest is a measure of deductive reasoning. He was able to complete each task but his scores fell in the deficient range, and are indicative of deficits that would require formal interventions.

Mathematical Computations—

Bobby was administered the math subtests of the WAIS-IV and WRAT-4 to determine his ability to perform calculations as they relate to daily functioning. The WAIS-IV is a clinical instrument utilized to assess cognitive abilities in adults from ages 16 to 90 years old. This subtest was administered to give a quantitative measure of his ability rather than to derive an intelligence quotient (IQ). The math subtest of the WAIS-IV consists of 22 questions that are read aloud and timed. No paper or pencil is given. The items become progressively more difficult. Bobby was able to receive credit for 7 of the 22 items. He demonstrated ability to perform simple addition. His responses yielded a standard score of 4 (mean of subtests is 7 ± 3). This score falls at the 4th percentile and is indicative of moderately impaired ability.

The WRAT-4 is an achievement test that measures the basic academic skills of reading recognition and comprehension, spelling, and arithmetic computation. The WRAT-4 is comprised of four subtests: Word Reading, Sentence Comprehension, Spelling, and Math Computation. The Math Computation subtest measures an individual's ability to perform basic mathematics computations through counting, identifying numbers, solving simple oral problems, and

calculating written mathematics problems. Bobby was able to correctly complete 9 of 40 items. He used scratch paper and has marks to compute his answers. He was able to again complete simple 2-digit addition and subtraction, but stated he never was taught his "times tables" and could not multiply. Additionally, he was unaware of what division was and had difficulty grasping that it was "the opposite of multiplication." He required assistance on word problems, and they had to be read aloud to him. He obtained a standard score of 65 (1st percentile). This score is equivalent to the third grade level of achievement. This score is classified as falling in the moderate to severe range when compared to the normative sample.

Summary/Conceptualization:

Mr. Bobby Moore, a 54-year-old African American male, was born in Coushatta, LA and raised in TX. He is the 4th of 9 children born to his parents. His parents remained married for approximately 57 years despite that fact that his father was physically abusive towards all family members. Academically, Bobby has historically performed behind that of his peers, but does not have a history of behavioral problems in school. Records indicated that he may not have received special services in his classes, and was not formally tested until age 13. However, he stated that he has always had profound difficulties in receptive/ expressive language, and required the assistance of his family for many of functional living tasks. He was retained several times and never passed a grade level passed on performance, despite extra efforts by his family and some teachers. He withdrew from school early in 7th grade. He led a transient life for most of his adolescent years, until being incarcerated. He has never married and has no children. His medical

history is complicated by multiple traumatic brain injuries. Currently, Bobby is incarcerated on charges of Capital Murder.

The current evaluation, including records review and a family interview, was conducted to assess domains of cognitive functioning. It seems that Bobby exhibited developmental and intellectual delays early in his life that were significant enough for him to require consistent monitoring and elicit help from his teachers. These deficits were demonstrated much prior to age 18, which would satisfy criteria for a formal diagnosis of Intellectual and Developmental Disability (IDD), formerly referred to as Mental Retardation. Adaptively, he had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition. Thus, there is historic information that accounts for Bobby's intellectual, developmental, and adaptive deficits; and indicates that he met full criteria for a diagnosis of mental retardation as a child.

Taking into account the records reviewed, prior intelligence test findings, and Bobby's performance on more stratified and task-specific neuropsychological tests, he more likely than not meets full criteria for IDD; and this clinician would be justified in assigning said diagnosis. Bobby consistently scored in a deficient range, even when his first formal testing did not occur until he was 13 years old (1973), which is the same time he left school. If tested when deficits were first apparent (approximately 6 years old given he was retained in 1st grade), his intelligence quotient (IQ) would very likely have been below the reported standard score of 70. In 1989, at age 30 and a decade

post, Bobby obtained a full scale IQ of 71. Similar to his score and findings in 1973, this score is deficient and inflated by what adaptive skills and learning he had acquired while incarcerated. More importantly, the latter score did not deviate much from prior scores (which is typical), and suggests that time and experience did not bring about new learning for Bobby. That is, the deficient score may be the maximum "ceiling" for his intellectual capacity. Test results from the current evaluation corroborate such when assessing his capability of learning new information.

Test findings from the current evaluation indicated slowed processing speed, difficulty with reasoning and judgment, and deficits in verbal ability that cannot be solely attributable to a limited fund of knowledge (i.e., deficits observed on Trails B). These higher-order deficits would likely be key in being able to adapt to one's environment, thinking quickly, and problem-solving. These domains would also be the most difficult to detect from just social contact, and may not come to the attention of others until adulthood. Bobby's severity and characterization of deficits was complicated by head trauma. That is, specific to his case is an impoverished brain that was even more compromised by multiple insults.

12/20/2013

/s/ Shawanda W. Anderson, Ph. D.
Shawanda W. Anderson, Ph. D.
Licensed Psychologist/Neuropsychologist

Date

cc: Mr. Patrick McCann, attorney
Ms. Harriet Smith, attorney
Mr. Tyler Hill, attorney

REPORTER'S RECORD
VOLUME 3 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

v.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 3rd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[48] Q. (BY MR. MCCANN) Doctor, what do you do for a [49] living?

A. I'm a neuropsychologist.

Q. What is a neuropsychologist?

A. A neuropsychologist is a clinical psychologist by training that has specialty training in either TBI or some anomaly of the brain.

Q. And "TBI" means traumatic brain injury?

A. Yes. I'm sorry.

Q. Would you mind briefly going over your education and experience for us, please?

A. Sure. My bachelor's degree is from Dillard University in New Orleans, Louisiana; I worked on a master's degree at Northwestern State in Natchitoches, Louisiana; and I received my doctorate in clinical psychology from Jackson State University in Jackson, Mississippi.

Q. And how did you begin to study neuropsychology?

A. I did a two-year—I did a predoctoral internship at the Utah State Hospital in Provo, Utah, and did a two-year postdoc fellow at Mississippi Methodist Rehab Center at Jackson, Mississippi.

Q. So you've had two years of specialized training after your doctorate in neuropsychology?

A. Yes.

Q. Okay. Since then have you been in private practice or any teaching positions?

[50] A. I have been in both.

Q. And where were you teaching?

A. I taught at Prairie View A&M University for four years and from there I worked for the Mental Health Mental Retardation Authority of Harris

County and subsequently from there, went into private practice. I'm still a contract psychologist with MHMRA.

Q. Okay. Have you written any research papers or presented any papers at professional associations in your field?

A. Yes.

Q. And how many times?

A. I think I have 12 articles and maybe 8 presentations.

Q. Okay. What is the primary focus of your experience nowadays? What do you do?

A. Neuropsychology with adolescents, children and the geriatric population.

Q. Okay. And did you come to be involved in this case with Mr. Moore in my office a few months ago at my request?

A. Yes.

Q. Okay. And what did I ask you to do?

A. To conduct an evaluation to determine if there was any organicity and possible traumatic brain injury.

Q. And would you explain what the term "organicity" [51] means?

A. If Mr. Moore was born with any sort of brain anomaly.

Q. And as part of your evaluation, would you go over with the Court what you did to prepare a report for us?

A. Yes. I read documents that were submitted to me, I conducted a five-hour evaluation with Mr. Moore and a two-hour interview with his family.

Q. So you actually went to their home?

A. Yeah, the home of an aunt, his aunt.

Q. And interviewed family members there?

A. Yes.

Q. Okay. And could you go over some of the standard tests that you administered?

A. Sure. I actually have them listed in the order that they were—

Q. That will be fine.

A. The first thing I did was review any records that were available and the records kind of came and went during the evaluation. I did what's called a mini mental status exam, just to make sure that—it's kind of a standard.

Q. Doctor, would you pull the microphone in just a little bit more closely to you.

A. Sure.

Q. And we've talked on the phone before and you have a [52] quick mind and you speak quickly. Would you slow down just a little bit for the court reporter, please?

A. Yes, I will. I said I did—I reviewed the records.

Q. Right.

A. I also did a mini mental status exam. I administered the Rey Complex Figure Test, the Symbol Digit Modalities Test.

Q. Would you spell some of those out if they're unusual words for us, please?

A. Symbol, Digit, just as it sounds. Modalities is M-O-D-A-L-I-T-I-E-S.

Q. Okay.

A. Test. Trails A and B.

Q. And what is the Trails Test?

A. The—would you like me to describe it in detail?

Q. In as Reader's Digest version as one could possibly do.

A. It's two parts. There's an A part and a B part. They are—they do not stand alone. On a standard sheet of paper there are circles with initially numbers in the circles and you are to consecutively connect the circles. They're randomly dispersed among the page. And the examiner, myself, I would time the examinees to see how quickly they could complete that.

[53] Q. Okay. And did you also administer the Hooper Visual Organization Test and the Controlled Oral Word Association Test?

A. I did.

Q. All right. And the California Verbal Learning Test-Edition II?

A. Yes.

Q. And those are tests of both, obviously, visual perception but also verbal perception as well?

A. Yes.

Q. And language skills?

A. Yes.

Q. Okay. Did you administer the Delis-Kaplan Executive Functioning and some subsets of the Wechsler Adult Intelligence and Wide Range Achievement Test?

A. Yes.

Q. Okay. Specifically the math subsets?

A. That is correct.

Q. Okay. Tell us what your findings were in order, if you would not mind, please.

A. Of each test or?

Q. Overall, your findings from the interview and from the test themselves.

A. Okay. The math and the part of the WAIS was administered in a subsequent session, so the initial session [54] was just the neuropsych test or just the ones that you mentioned earlier. What I found is that Mr. Moore's processing speed was slowed, although he had intact memory, and just from observation and speaking with him for about a hour and a half, I noticed that there were some possible deficits in language and processing speed. So, the test actually confirmed that. On formal tests there were also problems with reasoning and judgment. And let me refer to my report here.

Q. Sure.

A. And I think those were the most prominent.

Q. When you say "processing speed," literally that's the speed at which one takes in information, makes a decision about it and then responds?

A. Right. It's how fast your brain thinks.

Q. Okay. Like the chip in my laptop, in that sense?

A. Yes, I guess so.

Q. And the test findings, could you go through those, beginning on page 5 of your report?

A. Okay.

Q. Just in summary, if you would not mind. In terms of cognition, I noticed that we—I did not ask you to do a full IQ test but there were prior IQ tests, correct?

A. Correct.

Q. Okay. On the cognition findings, did you find what [55] appeared to be deficits in his cognition?

A. In the subsequent session or—

Q. In the first interview and some of the others, did you find any deficits?

A. Yes.

Q. Okay. And what were they?

A. In terms of—I'm sorry. In terms of what I read or in terms of what I observed?

Q. What you observed and what you were able to test for.

A. Yes, definitely in terms of what I observed and what I tested—when I test, the neuropsych tests take in a bit of cognition as well. They're not formal IQ tests where there is an IQ derived but there is surely thinking and thought that goes into those tests and because I could see the deficits as I'm administering it and it actually came out that his scores were impoverished and what I saw actually materialized in terms of numbers and on paper.

Q. Would you mind summarizing a few of those scores for us?

A. Sure. Verbal memory, which was the California Verbal Learning Test. It's what they call verbal learning because there's no visual. I don't actually show him a word. I read him 17—16—a list of 16 words and you're supposed to repeat back as many of the words as you can in [56] any order. I actually read that five times and with each trial, the typical person with exposure would get more and more words with each trial. Some people actually get all 16 and you ask them to repeat it again and if they get all 16, you don't administer any more trials.

Mr. Moore's performance was in the low average range, which it's not below average, it's just low average. So of the 16 words, after about 20 minutes, he could remember about 6 of the words. So, what that tells me is what he learned, he actually could hold onto, it just took him several times to actually learn it. So, it's not the retention or the recall or the memory that's impaired; it's the acquisition, it's the brain's capacity to hold onto those 16 words and actually learn them.

Q. Does that go back to the processing speed that you were talking about in some ways? Is it related to that?

A. I think it—in my opinion it speaks to the capacity of the brain to learn.

Q. Okay. Fair enough. And—

A. He could only process as fast as I could—can speak.

Q. Okay. Gotcha.

A. Or slow down.

Q. How was the visual memory?

A. Visual memory was a little bit better. The memory [57] is based on the perception. You actually have to perceive something before you can actually remember it. And his perception was very—was not problematic but he did draw the figure. You have to draw a figure and it's an abstract figure, so I can't say it's a boat or a rocket. It's just something with lines and angles. And he's supposed to recall and actually draw that. He drew it slowly, 412 seconds, which seems like a lot of time but it should probably have been done in about 2- to 300 seconds, so his processing of it is slow because it is abstract. It's a lot of information. But what he did draw, he could remember aspects of it.

THE COURT: I'm sorry. I did not hear the end of your sentence.

THE WITNESS: He could remember aspects of it, I believe is what I said.

Q. (BY MR. MCCANN) Pull that in.

A. Maybe I should just come up.

Q. There you go. And in terms of processing speed, tell us about that.

A. Again, processing speed is how fast the brain fires. And here's where—this is when I saw the most deficits. His processing speed fell in what we call a deficit range, so it's pretty low. In terms of a score, his T score was a 25 that I have listed here, where 50 is the [58] mean and the standard deviation is 10. So, 40 would be low average and then 30 would be low and then he's 25. So he's more than two standard deviations below the mean.

Q. Is there a percentile that that would place him in in terms of most people's processing speed?

A. There is but I need my little chart and cheat sheet to tell you that.

Q. That's all right. I need to look up all the punishment things on a chart, so that's fair.

Looking at this also, would you say that in terms of complex matters there was a test you gave that required completion of 110 items on written responses? Do you recall how many he actually completed?

A. That would probably be the simple digits. 32, according to the report.

Q. Okay. Out of 110?

A. Right, yes.

Q. Okay. And how would that place him in terms of normal folks' scores?

A. It's in the borderline impaired range. And just to qualify, most persons don't finish all 110. There's a time allotted. You have 90 seconds and you do as many as you can in 90 seconds.

Q. Okay. And you had mentioned that Bobby had some problems with verbal fluency and words during his interview. [59] Did you administer that—is it the Word Association Test?

A. I did. That test not only speaks to language but processing as well. It's timed. You're given a letter and you have to think of as many words as you can that begin with that particular letter, so it wasn't the fluency, meaning, say, the back and forth that you and I are having right now, it's just can you come up with them quickly, so it—I didn't give that test specifically

for fluency. It was for—more for processing speed even though it falls under language.

Q. So you say C, I say coffee, crib, car.

A. Exactly.

Q. And within that certain amount of time you score based upon that?

A. Yes, one minute.

Q. Okay. And what about executive functioning? And first tell us what you understand executive functioning to mean.

A. That's a hard definition. Executive functioning is what—Reader's Digest version would be higher order learning, so it's more frontal lobe judgment, reasoning, more abstract thought that comes as you mature and learn more.

Q. Okay. So, it should normally be a factor that would be normed across age and education?

[60] A. Yes.

Q. Okay. And how did he do on those?

A. Not so well.

Q. And I understand this is—you're a kind person but let's be candid here. What was the scoring?

A. All scoring was in the deficient range.

Q. And deficient is where in the scale of scoring?

A. Severe.

Q. So it's—

A. Beyond mild, moderate, severe and profound.

Q. Okay. You also administered some math tests to Bobby.

A. Yes.

Q. And tell us about those.

A. There were two. It was the arithmetic subtest from the WAIS-IV and the arithmetic subtest from the WRAT-4.

Q. Could you spell those out for the court reporter?

A. Yes, I can. I'm sorry. The WAIS is the Wechsler Adult Intelligence Scale and we're now on the fourth edition. It's the most current. And the WRAT is Wide Range Achievement Test, also the fourth edition.

Q. Okay. And the achievement tests measures academic skills whereas the Wechsler, which is I think spelled W-A-I-S-C-H-L-E-R, measures capacity and ability; is that fair, as a difference?

[61] A. The two tests? Yes.

Q. Yes.

A. Okay.

Q. And how were the scores on those?

A. On the WAIS, if I could give it to you in a T score again, his T was 30. And I do have a percentile. That's about the fourth percentile.

Q. And I want to be clear where that percentile is. That's the bottom fourth percentile, correct?

A. Yes.

Q. Okay. In other words, 96 people out of a hundred would have scored higher on that test?

A. If they were given the test 100 times, yes.

Q. Okay. And were there any other findings?

A. Well, with the WRAT?

Q. Yes.

A. The WRAT is different. With the WAIS there is no paper and pencil. The questions are just administered orally. With the WRAT there is paper and pencil and you can use scratch. Both are timed. And his standard score was about a 65. So that's not a T score. That's based on the 100 as the mean with a standard deviation of 15.

Q. Okay. What percent—a standard score of 65 would place him in what percentile?

A. The first. 1.

[62] Q. Again, the bottom first?

A. 1, yes.

Q. So what grade level would that probably be?

A. Third.

Q. Third grade?

A. Third grade.

Q. Okay. Mr. Moore's how old?

A. 56. I'm sorry. I'm not sure.

Q. Born in '59, so it would be 54.

THE DEFENDANT: 54.

THE WITNESS: 54. I'm sorry, Mr. Moore.

Q. (BY MR. MCCANN) Very well. And you also conducted some interviews with the family?

A. I did.

Q. Okay. And just, if you could, summarize those findings for us, if you would not mind.

A. Okay. There were several family members present and the purpose—my purpose for being there was to see if there were developmental issues, if any deficits were longstanding and chronic and what I learned from the family was that they, in fact, were, that these deficits had been seen in some form or another and reported by the school early on. And the family gave me more actuarial data, things like, you know, we never left Bobby alone and we had to hold his hand to do this and I helped him with homework. [63] So, that was the kind of information that I got from—there was an aunt, a cousin, several brothers and sisters, who all corroborated that information.

Q. Okay. So, and I just want to be sure I'm getting this in an accurate picture. You interviewed and tested Mr. Moore?

A. Yes.

Q. You went to his family's home and interviewed his family?

A. Correct.

Q. And you reviewed a number of other records, school, academic, medical, that we had submitted to you.

A. Correct.

Q. Okay. Originally I had asked you to examine him for organic problems in his brain. Have you done determinations of mental retardation in your practice?

A. I have.

Q. Have you done them few or many times?

A. I would say more few.

Q. Okay. And you do handle children and teenagers and people below the age of 18?

A. Correct.

Q. In your practice?

A. Yes.

Q. Okay. And you have been asked to make [64] determinations for them; is that correct?

A. Correct.

Q. Okay. And in your practice I asked you, after you came back with the initial findings, I asked you to review the criteria for determination of mental retardation, did I not?

A. Yes, you did.

Q. And in your opinion, would Bobby Moore meet the criteria for mental retardation?

A. Yes.

Q. Okay. And that would be true whether one was using the DSM-IV; is that fair?

A. Yes.

Q. Or the—formerly the American Association for the Mentally Retarded, now the American Association for—I'm sorry; I always get this wrong—Intellectual Disability and Developmental Disorders?

A. Correct.

Q. Okay. And whether one used those criteria or the DSM's, Mr. Moore would meet that criteria?

A. Correct.

Q. Do you have any hesitation about stating that he would meet those criteria? In other words, do you

feel that he didn't give you a good effort on his tests at all?

A. No.

[65] Q. Okay.

A. No, I mean, and I have no reservations about saying that. I think he gave great effort.

Q. Okay. And how long have you been giving these tests?

A. For ten years.

Q. Okay. And that's in both your teaching and your private practice?

A. Yes.

Q. Okay. And you gave—did you assist in giving those tests when you were getting your doctorate as well?

A. Yes.

Q. Okay. So, you actually have—you have more than ten years' experience doing this but as the chief boss, you have ten?

A. I give these tests every day of my life and I have since 1998.

Q. Okay. Fair enough. Thank you.

* * *

Q. (BY MR. PEEBLES) Good morning, Dr. Anderson.

A. Good morning.

Q. But we do have to be fair and say that you did not [66] ever administer a full-scale standardized IQ test, correct?

A. I did not.

* * *

[68] Q. Mr. McCann had asked you or indicated that he first hired you to examine Mr. Moore for organic brain disorders.

A. Correct.

Q. Right? And then when the results of your testing came back, he asked you to go and look into what the AAIDD qualifications for mental retardation are and then evaluate him for that, right?

A. No.

Q. I misunderstood?

A. Correct.

Q. Okay. Then he originally hired you for organic brain disorder?

A. Correct.

Q. And then how did you go from that to mental retardation?

A. I presented the results to Mr. McCann and his team.

Q. Uh-huh.

[69] A. And I'm familiar with the requirements for MR/IDD and there was no subsequent evaluation from that point except with his family.

Q. So, you evaluated your existing data to see if it fell within what you felt was a diagnosis for mental retardation?

A. Correct.

Q. So at that time you were administering these tests, you were not administering the tests with an eye for evaluating him for mental retardation.

A. Correct.

* * *

[70] Q. What about depression? Is that something that could lower scores?

A. Sure.

Q. What about somebody who has a specter of facing the death penalty? Could that lower scores?

A. I'm not sure.

Q. You've come across people that have lied to you in order to achieve what they think is their own personal benefit, right?

A. Sure.

Q. Because that's shading the way they're responding [71] in a manner to achieve a particular result which would benefit them, right?

A. Correct.

Q. Okay. And certainly a lower test score on these tests in this context, for someone facing the death penalty, that might be a motivator. We can agree on that, right?

A. Yes.

* * *

[74] Q. You referenced some materials that were given to you by the defense that you reviewed prior to interviewing the family members and Mr. Moore. Did those materials include any of the record, court record from this trial?

A. None.

Q. So where did you get your understanding of what Mr. Moore was convicted of?

A. I read reports on the prior IQ test.

* * *

[76] Q. (BY MR. MCCANN) Physical abilities can coexist with intellectual disabilities, can't they?

A. Of course, yes.

[77] Q. Somebody can be fit and physically well-coordinated while still having some form of mental impairment; is that a fair statement?

A. Yes.

Q. And the ability to swim or to play a game such as pool that involves physical dexterity, those can coexist in someone who has mental impairment still, can they not?

A. Correct.

Q. Okay. In the same way someone can be athletic but perhaps not terribly bright or the opposite, very, very bright and terrible athletically?

A. Agreed, yes.

Q. Okay. And in terms of your examination of the family—

A. Uh-huh.

Q. Did you—I hesitate to ask this but you've dealt with many families who had reasons for giving you slanted information; is that fair?

A. Yes.

Q. Whether to cover up a perceived deficit in a child or to, for some reason, in a dispute about what the child's actual deficit is, perhaps out of parental pride, whole host of reasons, but families don't always tell you the truth; is that fair?

A. That's fair, correct.

[78] Q. Okay. You spent a couple hours with Mr. Moore's family; is that correct?

A. Yes.

Q. Did you get any sense that they were shading information to you in any way?

A. No.

Q. In fact, some of their discussions, if I recall your description, they were emotionally painful to recount; is that fair?

A. That's fair, yes.

Q. Okay. And in terms of the Polunsky Unit, the death row unit that you went to—

A. Yes.

Q. —certainly not a place that most people would consider uplifting.

A. No.

Q. Okay. But at the same time if you have been in such an environment for three decades, is it reasonable to assume that even difficult environments, that people can adapt to them?

A. Yes.

Q. And that although an environment may be difficult, that someone can endure that and still present properly in a testing situation such as this?

A. Yes.

[79] Q. Okay. And regarding practice effect, and I realize I did not ask you to review any literature on that prior to coming up, but since you often deal with people who have suffered traumatic brain injury, such

as car accidents or returning veterans, practice effect is not necessarily something you run into in your practice much, is it?

A. No.

Q. Thank you.

* * *

[81] Q. (BY MR. MCCANN) In terms of writing or reading, somebody can obviously have a physical impairment that prevents them from writing while they can read an instruction; is that fair?

A. Correct.

Q. And someone could have an organic brain disorder that would prevent them having a control sufficient to write by hand but still be able to read a written word on a piece of paper; is that fair?

A. Correct. And I think when you—when the courtroom is thinking of writing, they're thinking of spelling and he had to write for me, not spell for me, and you can write without spelling.

Q. Okay.

A. And reading.

Q. Is that because you can copy a visual image?

A. Yes.

Q. Just like I would copy a drawing of a cat?

[82] A. Correct.

Q. Or a circle?

A. Correct.

Q. Okay. And I do want to—this would be my last one on this and I appreciate your time today. It is

possible for people with either mental retardation or organic damage to their brains to improve some skills such as reading and writing, isn't it?

A. Yes.

Q. Thank you.

* * *

Shawanda W. Anderson, Ph. D., HSPP
11250 West Road, Suite I
Houston, TX 77065

Licensed Clinical Psychologist / Neuropsychologist

(281) 890-7776 voice (713) 459-6241 mobile
(281) 890 7785 fax

shwi0899@yahoo.com

EDUCATION:

Jackson State University
Jackson, MS 39217
Ph.D., Clinical Psychology
08/97 - 05/04

Northwestern State University
Natchitoches, LA 71497
M.S., Clinical Psychology
08/94 - 08/97 (hrs. toward Ph. D.)

Dillard University
New Orleans, LA 70122
B.A., Psychology (cum laude)
08/89 - 05/93

EMPLOYMENT/EXPERIENCE:

Walden University, Minneapolis, MN
04/09 to present
Distance education lecture development and administration to graduate students pursuing doctoral degrees in Clinical Psychology. Records, grades, and office hours maintenance. Biannual travel for practica supervision and on-site clinical training. Thesis and dissertation mentoring, editing, and chairperson duties. Coursework based on quarter sessions.

Neuropsychological Associates, Houston, TX 77065
Private Practice
12/06 present

Neuropsychological evaluations, dementia ratings, school/university consultation, consultant and evaluator with the Neuropsychiatric Center. Providing individualized services, assessment, and psychotherapy to survivors of TBI, stroke, and other brain injuries. Referral source for local neurologists, school psychologists, psychiatrists, and other paraprofessionals.
www.neuropsych-associates.com

Research Consultation Pros, New York City, NY
Research Consultant
04/08 - present (on hiatus)

Independent research consultant with an on-line contracting agency that provides expertise in research methods and design, statistical procedures, APA style formatting. Assistance and guidance for completion of written assignments, Master's theses, and doctoral dissertations are also provided.

Mental Health/Mental Retardation Authority of Harris County, Houston, TX 77074
Clinical Psychologist VI-Specialized Therapies and Rehabilitative Services Clinic
06/07 - present

Primary duties include providing outpatient clinical services to children, adolescents, and young adults with Axis II diagnoses. Other duties are monthly presentations to the psychological staff (MR division) on ethical concerns and issues, affiliation with local teaching institutions (adjunct), and demonstrated research through formal presentations and publications. Behavioral support, treatment planning, family

therapy, Adaptive Behavior Analysis (ABA), supplemental neuropsychological assessments, differential diagnosis, and psychological evaluations are also included in secondary duties. Appointment to the 4-digit Fetal Alcohol Spectrum Disorders Assessment Team, and case management of consumers with brain injury (TBI), organic disorders, and those that are neurologically complex.

Adjunct Professor, Houston, TX 77064
06/07 - present

Serving as adjunct professor for several universities within the metro-Houston area (Texas Southern University, Houston Baptist University, and Houston Community College). Adjunct duties include teaching various graduate and undergraduate courses within the discipline of Psychology. Records maintenance and office hours held and coincide with number of courses taught. Courses, to date, include Physiological Psychology, Statistics I, and General Psychology. Adjunct duties are also for virtual, distance and/or asynchronous learning institutions. Specifically, Capella University and Walden University.

Prairie View A & M University,
Prairie View, TX 77446
Assistant Professor/Training Director
Graduate Department of Psychology
08/04 - 06/07

Served as Director of Clinical Training of the doctoral program in Clinical Adolescent Psychology. Responsible for implementing, documenting, and supervising clinical training experiences for doctoral students in the Clinical Adolescent Psychology Program. Additional duties include development of the program handbook, scheduling and coordination of oral and

written comprehensive exams, liaison between program and CUDCP, lecture and instruction of undergraduate and graduate classes in specialties of Psychology. Developed on-line and web enhanced classes for undergraduate studies. Classes taught: [Undergraduate] General Psychology, Physiological Psychology, Clinical Psychology, Statistics I, Senior Thesis; [Graduate] Cognitive Psychology, Neuropsychology, Testing & Assessment, Personality, Psychopathology, Psychotherapy, Practicum and Field Placement.

Methodist Rehabilitation Center,
Jackson, MS 39216
Post-doctoral Training Fellowship
08/02 - 08/04

2-year, APPCN accredited, postdoctoral fellowship in Clinical Neuropsychology. First year inpatient rotation with primarily TBI and stroke survivors. NIDRR funded National TBI Model Systems Grant data collection. Neuropsychological evaluation of acute and post-rehabilitation patients. Second year entailed community reintegration of brain injury survivors, group therapy, individual outpatient therapy, and family conferences.

Utah State Hospital, Provo, UT 84601
Predoctoral Internship
07/01 - 07/02

1-year, APA accredited, predoctoral internship in Developmental Neuropsychology. 6-month rotations on Youth & Children's Unit and Adult Unit. Additional training in Forensics, neuropsychological assessment, and differential diagnosis. Individual therapy, including cognitive remediation and music therapy. Research projects on OCD, Landau-Kleffner

Syndrome, severe and persistent mental illness, and test development of memory assessment.

Methodist Rehabilitation Center,
Jackson, MS 39217
Practicum/Externship Student
12/99 - 12/00

Assisted with National TBI Model Systems data collection and coding, development of the MS Aphasia Screen Test, non-Model Systems data collections. Neuropsychological evaluations and outpatient therapy with brain injury survivors. Required for fulfillment of doctoral degree coursework.

Oakley Training School, Raymond, MS 39154
Youth Services Counselor I
8/99 - 5/00

Conducted group and individual therapeutic sessions with 25 juvenile offenders in a med./max. security unit. Administered personality, achievement, and intellectual assessments. Wrote and developed treatment plans, parole notifications and updates. Arranged transitional placement for released offenders. Participated in the disciplinary committee. Maintained documentation and records and acted as a general advocate for the cadets. 1200 hours were towards Externship

MS Baptist Medical Center,
Jackson, MS 39203
Practicum Student
05/98 - 08/99

Worked with Life Enrichment Services. Major duties included intellectual, personality, and achievement assessment of dually-diagnosed adult and adolescent inpatient populations. Required for fulfillment of doctoral degree coursework.

Hinds County Human Resource Agency,
Jackson, MS 39203
Co-Director
8/97 8/99

Position funded by AmeriCorps/Corporation for National Service. Planned, coordinated, and scheduled after school activities for 29 "at-risk" youth. Devised monthly budgets, employee scheduling, volunteer recruitment, intellectual and achievement assessment, and supervised 2 other employees: Goals of the program were to improve academic performance of the youth, while building self-esteem and community awareness.

Jackson State University, Jackson, MS 39217
Teaching/Graduate Assistant
Department of Psychology
8/97 12/00

Responsibilities included lecturing, constructing exams, keeping conference hours, reporting and recording grades for undergraduates enrolled in General Psychology.

Housing Authority of the City of Shreveport,
Shreveport, LA 71101
Community Services Coordinator
3/97 - 8/97

Duties included, writing and renewing federal grants to receive supplemental funding of coordinated educational, self-improvement programs/activities for public housing residents (i.e., GED programs, family self-sufficiency programs, self-esteem seminars, Welfare-to-Work training, etc.), and administration of surveys to assess needs and concerns of the residents. Secured $1.8 million from Housing and Urban Development

(HUD), in conjunction with The Salvation Army and other homeless shelters in the Metro area.

Northwestern State University,
Natchitoches, LA 71497
Graduate Assistant
8/94 - 5/96
Department of Psychology

Tutored and graded exams for undergraduate classes in statistics. Lectured in General Psychology. Observed and graded clinical interviews of graduate students enrolled in the Master's program. Coordinated and taught Personality Assessment (PSY 576, MMPI-2 and projective techniques).

Articles/Peer-reviewed Manuscripts for Publication:

Anderson, S. W. & Jackson, C. R. (2009). Differential diagnoses and treatment of behavioral disturbances associated with Landau-Kleffner Syndrome: The case of T. R. *Clinical Case Studies, 8(1),* 14-24.

Anderson, S. W., Sutton, M. J., Brown, K. L., & Francis, N. (2008). Assessment of older driver abilities: The negative impact of anxiety on risk-taking behaviors. Manuscript submitted for publication *in Anxiety, Stress, & Coping.*

Wilson, D. E., Foster, J. & Anderson, S. W. (2009). Racial socialization's moderating effect between poverty stress and psychological symptoms for African American youth. *Journal of Black Psychology, 35(1), 102-124.*

Anderson, S. W., & Moore, P. A. (2009). The impact of education and school-based counseling on children and adolescents' views of substance abuse. *Journal of Child and Adolescent Substance Abuse, 18(1),* 16-23. Research funded by Career Development

Mini-grant provided by the Texas Juvenile Crime Prevention Center and the PVAMU College of Juvenile Justice & Psychology.

Anderson, S. W., Sly, K., Hart, K., & Alexander, K. (2008). Differentiating between chronic and nonchronic juvenile offenders using the MMPI-A. Manuscript submitted for publication in *Journal of Offender Rehabilitation (revisions pending).*

Anderson, S. & Booker, M. (2006). Cognitive Behavioral Therapy versus psychosurgery for a refractory case of Obsessive Compulsive Disorder. *Journal of Neuropsychiatry and Clinical Neurosciences, 18(1),* 129.

Anderson, S. W., Gontkovsky, S. G., Sherer, M., Nakase-Thompson, R., High, W., & Sander, A. (2004). The effects of intrastate location on treatment compliance for TBI survivors. *Journal of Cognitive Remediation, 22(4),* 6-10.

Anderson, S. W (2004, November). Self-esteem and racial identity of African American students attending predominantly white versus historically black institutions: Implications for institutions. *Journal of African Studies.* University of Houston: Houston, TX.

Anderson, S. W. (2004). *Differentiating between chronic and nonchronic juvenile offenders using the MMPI-A.* Doctoral dissertation. ProQuest, Social Sciences, #3148763. ISBN: 0496081098

Anderson, S. W., Crist, A. J., & Payne, N. (2004). Predicting inpatient length of stay using the Brief Psychiatric Rating Scale-Expanded. *Psychiatric Services,* 55(1), 77-79.

Presentations at Scientific Meetings:

Anderson, S. W. (2007, March). *The Impact of Education and School-Based Counseling on Children and Adolescents' Views of Substance Abuse.* Paper and poster presented at the 9th Annual Lonnie E. Mitchell National HBCU Substance Abuse and Mental Health Conference, Washington, DC.

Anderson, S. W. (2006, April). *A Glimpse into the Academic Achievement Testing of African American Children.* Paper presented at the 1st Biannual African American National Conference: The Black Scholar and the State of Black America, Michigan State University, East Lansing, MI.

Moore, P. A. & Anderson, S. W. (2005, August) *Posttraumatic Stress Disorder in Children: An examination of the treatment modalities and proposed African-centered treatment paradigms.* Paper presented at the 37th Annual International Convention of the Association of Black Psychologists, South Beach, FL.

Anderson, S. & Moore P. (2005, February). *Chronic juvenile offending and the MMPI-A.* Paper presented at the 32nd Annual Meeting of the Western Society of Criminology, Honolulu, HI.

Williams, S. & Crist, A. J. (2002, October). *Predicting inpatient length of stay using the Brief Psychiatric Rating Scale-Expanded.* Poster presented at the 110th Annual Meeting of the American Psychological Association, Chicago, Illinois.

Williams, S. (2001, September). *Treating Refractory Obsessive-Compulsive Disorder.* In-service staff training for Adult Services of the Utah State Hospital, Provo, Utah.

Williams, S. (1999, June). *Self-esteem and racial identity of African American students attending predominantly white versus historically black institutions: Implications for Institutions.* Poster presentation at the 12th Annual Meeting of the American Psychological Society, Denver, CO.

Williams, S. (1997, October). *Self-esteem and racial identity of African American students attending predominantly white versus historically black institutions.* Paper presented at the 49th Annual Meeting of the Louisiana Psychological Association, Baton Rouge, LA.

Williams, S. (1994, December). *What is known about Schizophreniform.* Paper presented at Northwestern State University, Fall 1994 Research Day:

Williams, S. (1993, October). *How much and when should a therapist disclose: A review of the literature.* Paper presented at the Dillard University Senior Seminar on Ethical Concerns.

Williams, S. (1993, April). *Children reared by single parents.* Paper presented at Dillard University, Spring 1993 Research Day.

Williams, S. (1992, May). *The influence of list length on the amount of recall* (Senior research project, independent study). Paper presented to the Dillard University School of Education.

Williams, S. (1992, May). *Determining point of subjective equality using the Muller-Lyer Illusion.* Paper presented at Dillard University, Spring 1992 Research Day.

Williams, S. & Frank, L. (1992, February). *Motivation, the organization of action: Obsessions and compulsions.* Paper presented at Dillard University, Spring 1992 Research Day.

Williams, S. (1991, September). *Factors that interfere with memory-why we forget.* Paper presented at Dillard University, Fall 1991 Research Day.

Grants, Honors and Awards:

- Credentialing Scholarship from the National Register of Health Service Providers in Psychology, 2008
- $1,000 mini-grant from Texas A & M University System/Disability Training Network; Spring, 2007
- $20,000 professional development grant from COJJP, PVAMU; Fall, 2004
- National Science Foundation/Association of Institutional Research Summer Fellowship; July, 1999
- American Psychological Society Travel Award; June, 1999
- $1.8 million housing grant from HUD c/o The City of Shreveport Housing Authority; 1997
- Jackson State University Graduate School Scholarship/Assistantship; August, 1997-2000
- National Service Corporation Educational Award/Scholarship; August, 1997-1998
- Northwestern State University Academic Scholarship/Assistantship; August, 1994-1996
- Psi Chi Honor Society; Fall, 1992

- Dillard University Biology Achievement Award; Spring, 1991
- Dillard University Mathematics Achievement Award; Spring 1990
- Dillard University Academic Scholarship; August, 1989-May, 1993

Affiliations/Licenses:

- Licensed Psychologist (TX License #33380)
- National Register of Health Service Providers in Psychology credentialed (#52173)
- National Academy of Neuropsychology, 2001
- Association of Black Psychologists, 2000
- Association for Institutional Research, 1999
- American Psychological Association, 1998
- American Psychological Society, 1998
- AmeriCorps National Service Volunteer, 1997
- Psi Chi Honor Society, 1992
- Licensed Psychometrist (MS #169236), 2000-2005

Paid or Volunteer Experiences Related to Interest in Mental Health Research:

- Counselor for Katrina survivors, funded by Goodwill Industries and Bethel's Place, 2007
- Committee Member for the PVAMU Institutional Animal Care and Utilization Committee, 20062007
- Editorial Board/Reviewer for *Scientific Journals* International, 2006 to present
- PVAMU National Depression Screening Day Chairperson, October, 2005-2007

- Faculty Fellow for University College, PVAMU, Spring 2005-2007
- Peer reviewer for *Knowledge and Best Practices in* Criminal *Justice & Psychology,* published by the PVAMU COJJP, 2005.
- Peer reviewer for *Psychiatric Services,* published by the American Psychiatric Association, 2003
- Data collection for Wechsler Intelligence Scale for Children- 4th edition (PI project); 2002
- Completed Red Cross Disaster Training for Mental Health Workers; worked 9 hours with 2002 Winter Olympics
- Volunteer Judge for the Mississippi Science and Engineering Fair; March, 1998
- Volunteer Program Director of the Mary. C. Jones after-school mentor/tutoring program supported by Hinds County Human Resource Agency/Metro Jackson Service Coalition; August, 1998-2002
- Volunteer Test Administrator of the Iowa Test of Basic Skills (ITBS) for Operation Shoestring's Project Reading 'n' Ready (developed to improve academic achievement and self-esteem of impoverished children), Jackson, MS. Supported, in part, by United Way; August, 1997-August, 1998
- Volunteer with the National Service Corporation, Washington, DC; August, 1997-2002
- Participated and represented Shreveport Housing Authority in a violence prevention campaign for juveniles at Bossier Parish Community College; July, 1997
- Participated in the Dillard University, McDonough 28 Middle School consortium. Counseled "at-risk"

youth enrolled at McDonough 28, conducted round-table forums, wrote and performed skits pertaining to problem-solving strategies; August, 1992-May, 1993

References:

Jeffrey Cassisi, Ph. D.
Professor & Chair
Department of Psychology
1200 Murchison Road
Fayetteville State University
Fayetteville, NC 28301
cassisi@att.net

Kaye Sly, Ph. D.
Advisor/Associate Professor
JSU Community Health Program
P.O. Box 17055
Jackson, MS 39217
(601) 979-3693
kaye.f.sly@ccaix.jsums.edu

Mark Sherer, Ph. D., ABPP-Cn
Director, Research and Neuropsychology
Memorial Hermann/TIRR
1333 Moursund
Houston, TX 77030
(713) 799-7007
mark.sherer@memorialhermann.org

Edward L. Manning, Ph. D.
Child Neuropsychologist
University of Mississippi Medical Center
Department of Neurology
Jackson, MS 39217
(601) 984-5521
emanningneurology.ums.med.edu

Alan J. Crist, Ph. D.
Director of Internship
Utah State Hospital
Department of Psychology
P. O. Box 270
Provo, UT 84603
(801) 344-4366
acrist@utah.gov

Nancy Louise-Howes, Ph. D.
Utah State Hospital Neuropsychologist
P.O. Box 270
Provo, UT 84603
(801) 344-4534
nhowes@utah.gov

Daniel Georges-Abeyie, Ph. D.
Department Chair, Public Affairs
Texas Southern University
3100 Cleburne
Houston, TX 77004
(713) 313-7011
georgesabeyiede@tsu.edu

Keith Wismar, Ph. D.
Departmental Chairperson
Department of Psychology Dillard University
2601 Gentilly Blvd.
New Orleans, LA 70122
(504) 283-8822

Derek J. Wilson, Ph. D.
Prairie View A & M University
Undergraduate Coordinator
Mail Stop 2600,
P.O. Box 519
Prairie View, TX 77446
(936) 261-5223
dejwilson@pvamu.edu

Maria Quintero-Conk, Ph. D.
MHMRA-Deputy Director
MR Administration
7011 SW Freeway, 3rd floor
Houston, TX 77074
(713) 970-7000
maria.quintero@mhmraharris.org

REPORTER'S RECORD
VOLUME 2 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

v.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 2nd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[181] Q. (BY MR. MCCANN) Dr. Greenspan, if you would, would you tell the Court what you do for a living, please?

A. Excuse me. I'm a retired professor from the University of Connecticut where I was professor of

educational psychology; and I have a clinical appointment at the University of Colorado, where I live now, in the department of psychiatry; and I also have a consulting [182] practice around mental retardation and particularly in forensic settings such as this.

Q. Would you mind going over some of your educational background with us, please?

A. I have a PhD in developmental psychology from the University of Rochester and a postdoctoral fellowship in mental retardation and developmental disabilities from UCLA Neuropsychiatric Institute in the medical school there.

Q. Could you go over some of your research and publications?

A. Yes. I've had a number of appointments, University of Nebraska, Vanderbilt University, where I was a research scientist in one of the federally-funded mental retardation research centers and I have published quite a bit in the area of mental retardation, particularly around diagnostic issues including in an Atkins setting.

* * *

[186] Q. (BY MR. MCCANN) That's fine. Going to this then, as I understand you, the move has been gradually away from rigid IQ scores to IQ scores being a factor or indicator of potential intellectual disability; is that fair?

A. Yes. In fact, in DSM-V, it says neuropsychological measures such as executive functioning are as important or [187] maybe even more important.

Q. Okay. So measures such as Dr. Borda's, you know, somewhat cutely named but still valid Tinkertoy Test, as a measure of executive function, is a good indicator of problems with that?

A. For sure, yes.

* * *

Q. Okay. In going through for consulting on this [188] case, when you're looking through this, what are the things that you try—what's your approach in when you examine a, I suppose, client or subject would be the word, or case file, when you examine those things, what are your methodology? How do you approach this?

A. Well, I put great weight on percipient statements of people, such as the ones who testified today. I place great weight on the fact that people may have described him as slow or stupid or retarded, whatever the word might be, at an early age, which is something that I know the Texas supreme—high court has indicated is important. I look at test scores, look at consistency across test scores and certainly there's a great deal of consistency here.

* * *

Q. That would be fine. If you can, just quickly bring them out because I want to talk about—and I'll frame the question while you're looking for it—the Slosson test, that was the first test that he was given, was a 57, okay. Do you know or can you tell us much about the origins of that test?

[189] A. Well, I've given it. It's since been upgraded. It's not the greatest test. It's more of a screening test. The—as an old test, they use what's called the ratio method, which Dr. Borda described, that is mental

age, which is basically the average score that people of different ages, in this case, children of different ages receive the mean score, they convert that to a mental age. Then you take the person's chronological age, divide the mental age by the chronological age and multiply by a hundred.

It's not the most reliable approach, particularly with adults, because chronological age keeps going up, even though mental age might not that much. But it certainly, as a screening measure, has some validity and certainly validates the concerns that teachers and others obviously had or they wouldn't have had such a test. And I know it's an individually-administered test because I've given it.

* * *

[190] Q. Okay. Looking at the Wechsler or Wechsler, however one wants to say that test, do you believe that those are good, sensible, valid tests?

A. Well, the Wechsler scale is today considered the gold standard. It's the test that's most wildly given by psychologists and neuropsychologists and it's the one that's most relied upon in high stakes settings, such as a court case.

* * *

[194] Q. And looking at that, is it important to understand that people can get an incomplete picture from one area of competence in regards to someone having MR? Is that fair, that someone can be perceived to be competent in one area and thus people without experience in the field might extrapolate that, thus, he cannot be retarded?

A. Well, I mean, the biggest problem in diagnosing MR—and it's particularly a problem in forensic

settings—is the persistence of stereotypes, layperson [195] stereotypes. So, when we think of intellectual disability, we think of Mickey Rooney in the TV show running a coffee stand at the University of Iowa or Sean Penn in a movie about a man who's a parent and for the most part, they have very primitive speech and they—you could just look at them and know they have intellectual disability from their look or their behavior.

For the most part, people with mild mental retardation look normal and they can carry on a conversation. And I was on a board of an ARC agency in Connecticut and I used to go to board meetings and there was one guy, I thought he was a staff member. After a while, it took me about six months to figure out he was actually a client because he had such good superficial social skills. When you get to know him a little better, you realize that he keeps repeating the same story over and over and that his limitations are pretty significant but I wouldn't have known that right away.

A lot of experts, a lot of laypeople, correctional people who are basically laypeople when it comes to intellectual disability, you know, they look at whether somebody is pleasant, doesn't give them trouble, and they can assume the person is much more competent than he really is.

* * *

[200] Q. Okay. In looking at this, have you had a chance to review any other IQ tests that were administered perhaps recently?

A. I saw one today from—

Q. Okay. And what was that IQ score?

A. I'm sorry. I'm very bad with names but—

MR. PEEBLES: Dr. Compton.

THE WITNESS: I'm sorry?

MR. PEEBLES: Dr. Compton.

THE WITNESS: Dr. Compton. I apologize.

A. That was the WAIS-IV, which is the current gold standard that was revised a few years ago.

Q. (BY MR. MCCANN) And what was the raw score on that?

A. Well, what's relevant is the standard score. I believe it was 59 and she did a Flynn correction which [201] brought it down to 57, which is very low, but it's almost identical to the Slosson that was given when he was 13.

Q. So, within those two ranges they're actually consistent?

A. Yes.

* * *

[211] Q. (BY MR. MCCANN) Doctor, what's the most difficult thing that you have found to overcome in terms of both lay and legal misperceptions about mental retardation?

A. Well, there's a tendency to cherry-pick particular behaviors and say, well, in my opinion, somebody with mental retardation can't do that but there was actually a study by the U.S. Department of Education, it's called the National Transition Study, where they followed people ten years after they came out of special education and people with various labels, not just intellectual disability, but that was one of the subgroups, and what they found was that whatever the adult role might be, a significant percentage of

people who would have been labeled intellectually disabled in school were playing those roles, driving a car, holding a job, getting married, whatever the case might be. You can find a significant percentage of people with intellectual disability playing those roles. And that's a very difficult conception or belief to get over because the average person [212] thinks he can recognize intellectual disability when he sees it and that's just not typically the case.

* * *

A. No, I don't believe so.

Q. Well, have you read the transcript of Mr. Moore's first jury trial?

A. No, I have not.

Q. Have you read the transcript of Mr. Moore's second jury trial?

A. I don't believe so.

Q. Are you familiar with the underlying facts of this case?

[213] A. Yes, generally.

Q. What is your general understanding of the facts of the case?

A. My understanding is that there was a store, either a grocery store or some kind of retail establishment, and Mr. Moore was one of two or perhaps three people who held up the store. He was holding a shotgun on a gentleman who was in the service area, the shotgun went off and he killed him and then he ran out.

Q. Are you familiar with whether Mr. Moore talked to the police after his arrest?

A. Well, based on what I've heard today, the answer would be yes.

Q. Prior to today, when you were formulating your conclusions that you've testified to today, you were not aware of whether he'd talked to the police or what he said?

A. Well, I just want to clarify that I'm not diagnosing Mr. Moore and I—my primary role in this case, as I understand it, is to be a teaching expert, talking about what intellectual disability is.

Q. To enlighten us?

A. I'm sorry?

Q. To enlighten us?

A. Yes.

Q. And that's fair. And I think it's also fair for us [214] to admit that nobody can diagnose someone as MR or ID without having themselves done a full battery of tests. Would you agree?

A. I wouldn't—I would agree partially. I think it's improper to diagnose somebody without having spent some time with him or her, which is why I refuse to give a diagnosis here, but I think it's possible, if one meets the individual and does some clinical work, to make a diagnosis by integrating that information with other information.

Q. Are you familiar with whether anyone diagnosed Mr. Moore with mental retardation in his developmental years?

A. No.

Q. You're not familiar or to your knowledge no one did?

A. I know that mental retardation came up as a topic. I don't believe he was ever diagnosed as such.

Q. Well, and when you say it "came up as a topic," the materials that you reviewed said that some of his very early teachers suspected from his—that he was quiet, he was nonresponsive, they suspected, well, we don't know if he's mentally retarded or if he has a learning disability or what it is but we think that it's just that he hasn't been taught, right? They essentially suspected maybe it was mental retardation but then they said, no, we don't think it [215] is. Is that fair?

A. I really can't say as to what they thought.

Q. Okay. But based on what you read, didn't it say, Suspected possible mental retardation but we don't believe—

A. Well, a teacher is not competent to make that diagnosis one way or the other.

Q. Well, and that wasn't really my question whether they were competent to make the diagnosis. My question was: Isn't that what the documents said, that you reviewed?

A. Yes, more or less.

Q. When we talk about measures of executive functioning, I guess we're talking about the ability to exert adaptive behaviors?

A. Not really. It can obviously shed light on adaptive behaviors but adaptive behavior really has to do with how one functions in the world. Executive functioning is more of a cognitive measure that specifically gets at certain underlying reasoning skills that obviously have great relevancy to adaptive functioning but they're not the same thing.

Q. So then if we assume, like from Mr. McCann's questions, the commissary slips, I think the questions were, as a learned, repeated behavior over years and years and years, somebody's going to be able to adapt and do that even [216] if they're mentally retarded, but their executive functioning would appear to be intact, right?

A. Everything is context-dependent. There's no—that one—there's not one skill you can think of where you can't find 3-year-olds doing it. When we talk about executive functioning, we're for the most part talking about more complex behaviors and—that are novel, that require some degree of judgment. So, when you're talking about filling out a commissary form, it's not novel and it really makes very minimal demands on judgment.

Q. When you say that there's not one skill that we would find that we can't find a 3-year-old that will do it, can you contrast that with your statement that you have found no evidence at all to suggest that Mr. Moore is anything other than deficient in every single one of these areas?

MR. MCCANN: Objection. I think that's a mischaracterization of my witness' prior testimony. Could we—is there a read back, possibly?

THE COURT: Maybe—

MR. PEEBLES: Read back is not necessary. I'll rephrase my question.

THE COURT: Yeah. I mean, he can tell us what he said.

MR. MCCANN: Fair enough.

[217] Q. (BY MR. PEEBLES) You were asked questions about these different areas of adaptive

skills. There used to be nine or ten, I think, and now you said there's three?

A. Well, I know you don't want me to give you a lecture but originally it was 9, it turned into 10 and eventually it morphed into 11.

Q. All right. With respect to those, I think your testimony was that there's no evidence here in your mind to suggest that he's anything other than deficient in every one of those areas?

A. That may have been an overstatement. I acknowledge that.

Q. Because we could find a 3-year-old that could do any task if we looked hard enough, right?

A. Yeah, that's one of the problems with taking isolated behaviors because we don't have a normative context for that behavior. Even holding up a store, we don't really know what the normative developmental progression is for pulling a trigger on a shotgun, especially when it may have gone off accidentally.

Q. Well, let's talk about that because do you think there was a chance in this case that it may have gone off accidentally?

MR. MCCANN: Objection. I'm sorry. I don't offer this expert as a gunsmith or some kind of ballistics [218] person. How would he know?

MR. PEEBLES: But this witness just opened the door to this question.

THE COURT: Go ahead and answer it if you can.

A. Well, I know it's an issue that was raised. There was some discussion of the two triggers. The right one had a pull level that was just above the threshold for accident; the left one was higher. But the right one was

the one that went off. I know it has—it was argued by the defense in some earlier documents that I saw that there was a possibility that it was an accident. Be that as—I'm not saying that it was an accident but—

Q. (BY MR. PEEBLES) And in fact, the firearms expert testified that it would never have been an accident with a 3.75 to 4-pound trigger pull. What I'm interested, though, is you just said it was just above the threshold pull for an accidental discharge and I hadn't heard about that. Where did you find that information?

A. I was given a document, 200 or so pages, with all the different pleadings and that was one of the things that came out in there.

Q. You testified a little bit about something and I didn't quite follow what you were saying. This was around the cloak of competence area and you talked about someone who's thinking about committing a crime. Do you remember [219] what you said?

A. No.

Q. Do you remember what that was about?

A. Could you rephrase that? I'm not quite sure I know what you're asking me.

Q. You talked about how someone who is mentally retarded, let's say, using the old language, would consider committing a crime a little differently than someone who was not mentally retarded, at least that was the gist I got. So, can you expand on that a little bit?

A. Yes. I'm almost quoting from the Atkins—the U.S. Supreme Court Atkins decision, a moral culpability in people with intellectual disability is lessened because of their inability to reflect and also

to—because of their gullibility, because they're often—they lack the ability to—the relative ability. It's not absolute, obviously.

Q. So, gullibility is sort of like suggestibility?

A. I would say suggestibility is one of the things that contributes to gullibility, yes.

Q. Okay. And that would, I guess, imply that someone with MR is kind of led into committing crimes by other people. They're gulled into it, lack of a better word?

A. I think they're much more likely to get involved in a criminal sequence of behaviors without fully understanding what's going on or without really being able to reflect on [220] the possible consequences of that behavior.

Q. What if the person had been to prison before and now they're being gulled into another one? Can't they reflect on the consequences at that point?

A. Well, I mean, people who have had some prison experiences, they become a little more street smart, for example, knowing not to—perhaps becoming less trusting of interrogating police officers, for example. But one of the hallmarks of the gullibility of people with intellectual disabilities is they keep making the same mistake over and over again. They don't learn from their mistakes. They don't learn from the consequences.

Q. Okay.

A. And when it's a situation where they're being pressured by someone else, whatever the level of pressure might be, they're more likely to go along with it.

Q. What if the crimes that sent him to prison the first time were not the result of being pressured into a crime with other people; they were actually independent choices and that person was the only one there and the only person that committed the crime?

MR. MCCANN: I'm sorry, Your Honor. I think we're far afield on relevancy here at this point.

MR. PEEBLES: Judge, I can show the relevance because the documents that are in evidence show that when [221] Mr. Moore was evaluated at TDC upon his arrival and they asked him about the previous crimes, he told them exactly what he did. They were all committed by himself: Two burglaries of a habitation, one in the front door, one in the back door; and then he approached some kid walking down the street, stuck a gun at him and took his money.

MR. MCCANN: Your Honor, we're not here to go over his prior crimes. The issue here is intellectual disability.

THE COURT: I get that and perhaps it's just because your expert witness has sort of talked about that type thing, so I'll give you a little bit of leeway.

Q. (BY MR. PEEBLES) So, I guess the question was: How does the analysis get affected if the person had been sent to prison before, so had a little exposure to the consequences, and the previous cases that landed them in prison were 100 percent kind of individual crimes with no other gulling factors?

A. Well, I'll tell how they connected. Gullibility is a subtype of foolish behavior and foolish behavior is behavior that fails to take into account the likelihood of some very bad consequence occurring. It can take place in a personal context where the person is being

pressured, which is what I call gullibility, or it can take place in a context where no one else is involved. The thing that [222] unites these is what you might call stupid behavior and if you show me somebody who commits the same kind of crime every time, whether or not it's in a social context, and the same kind of bad outcome happens every time, then we go to jail, that's very congruent with gullibility and it's very congruent with a diagnosis of intellectual disability. Most of my recent papers have more to do with foolishness than with gullibility.

Q. And this is kind of a crazy example but you've been here sitting in testimony today, right?

A. Yes.

Q. And you saw Mr. Fronckiewicz take the stand, the writ writer. Remember him?

A. Yes.

Q. He'd been to prison over and over and over again, right?

A. (No response.)

Q. Right?

A. Yes.

Q. A history of foolish choices. And nothing about him struck you as being mentally diminished, did it?

A. Well, actually, I have a four-factor model of foolish behavior.

Q. I apologize. Nothing about him struck you as being mentally diminished, did it?

[223] A. No, he seemed pretty sharp.

* * *

REPORTER'S RECORD
VOLUME 3 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

v.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 3rd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[4] Q. Doctor, how many years have you been specializing in evaluating people for mental retardation?

A. Since around 1975.

Q. And recently you've done quite a bit of consulting [5] for lawyers and courts on this issue, correct?

A. Yes, subsequent to the Atkins decision, I started getting requests to help in these kinds of cases.

Q. Do you typically testify for the defense or for the prosecution or both?

A. I've only been contacted by the prosecution once. I certainly would be willing to help the prosecutor if I felt able to. But the vast majority of my consulting has been at the request of defense attorneys; however, I should point out that I don't always agree to help. I'd say, in about a quarter of the cases, I'd say I don't think you have a case here for me.

Q. How many times have you actually tested somebody for mental retardation post-Atkins?

A. Well, about half the time I function as a kind of a teaching expert, which is my role here. About half the time I play more of a clinical role where I do the teaching but I also give a diagnosis and—

Q. And I appreciate that answer but my question really was: How many times would you estimate that you have actually done the testing on someone for mental retardation?

A. 10 to 12 times but I haven't testified in all of those cases because I didn't always find for mental retardation.

Q. So, in the times when you have—you said, what? [6] 12 to 14 times you've tested for MR?

A. Something like that.

Q. What percentage do you think you found the person was MR versus was not MR?

A. Well, I should point out I don't do a comprehensive evaluation. I focus primarily on adaptive functioning and I rely for the most part on other tests—usually there's several—to get at Prong 1, intellectual functioning, so I would—

Q. And I apologize. I appreciate that information; however, I really just wanted to know, of those times that you've tested, were you able to definitively diagnose someone as either, yes, they're MR or no, they're not, or what was the numbers on each side of that?

A. I would say about two-thirds of the time, yes and one-third of the time, no. But I don't get involved in the case unless I see there's at least a prima facie case that can be made.

Q. Okay. Now, you said you don't do a full-blown test when you test for MR. Of the ones that you've just talked about, were those full-blown tests or were they not full-blown tests?

A. No, I don't do IQ tests. Even though I've taught IQ courses many years ago, I don't do IQ testing, so.

Q. Under the current standards or even the prior [7] standards for what constitutes MR, isn't a full-scale IQ test part of that standard?

A. Yes, and there always is one.

Q. Okay.

A. If there's not one in the record, and there almost always is, I request that someone who is more current with IQ testing do that.

Q. So you review someone else's work?

A. Correct.

Q. Someone that performed those tests in your absence, I assume?

A. Typically, yes.

Q. Typically? Have you ever been present when someone else did a full-blown IQ test that you then relied on to form an opinion on mental retardation?

A. On one occasion that test—that case was resolved without my testifying.

Q. Have you ever come under professional scrutiny by any of your peers?

MR. MCCANN: Objection. Could my colleague rephrase so that we understand what that meant?

THE COURT: Please. If he can't answer the question.

A. Well, I received awards from my peers. I've never been sanctioned or criticized by my peers.

[8] Q. (BY MR. PEEBLES) Have you ever been sanctioned or criticized by any Courts in which you've testified?

A. Yes. There was one Judge, a federal Judge in Puerto Rico, who took a dislike to me, said some negative things; but to my knowledge that's the only time.

Q. In fact, that federal Judge issued a federal opinion warning Courts across the country to be cautious in reviewing your testimony, didn't he?

A. That's my understanding.

Q. That opinion came out about one year ago, didn't it?

A. Yes.

Q. It was when you evaluated a gentleman by the name of Alexis Candelario Santana.

A. I didn't evaluate him. I was a teaching expert in that case.

* * *

[40] Q. Are you aware of any standardized adaptive testing done in this case?

A. Yes. The only one I saw was Dr. Compton, I believe, did something called the Texas Independent Living Scale, which is what's considered a direct measure of adaptive behavior. There are also rating instruments such as the Vineland I just mentioned.

Q. Okay. What was—

A. But there are a small number of direct measures which are like IQ tests.

Q. Okay. Let me stop you. And again, do you recall the score that was listed on the Texas instrument that Dr. Compton gave?

A. Yes. It was—well, she said it was two and a half standard deviations below the mean, which is, below 70. It would be the equivalent of something in the 60s.

* * *

REPORTER'S RECORD
VOLUME 3 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

v.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 3rd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[83] Q. Would you introduce yourself to the Court?

A. My name is Kristi Compton.

Q. And can you spell that for the record?

A. K-R-I-S-T-I C-O-M-P-T-O-N.

Q. And is it Dr. Compton?

A. It is.

Q. Dr. Compton, what do you do for a living?

A. I'm a clinical and forensic psychologist. My [84] primary practice is in Dallas, Texas.

Q. How many years have you been licensed to do that?

A. 12 years. I'm sorry. 14 years.

Q. In your capacity, are you sometimes asked to qualify as an expert and testify in court in matters regarding mental health?

A. Yes, I am.

Q. Have you done that many times or a few times?

A. Many times.

Q. Approximately how many?

MR. MCCANN: Your Honor, we would stipulate that Dr. Compton's an expert on this subject matter.

THE COURT: Fair enough.

Q. (BY MR. PEEBLES) Then briefly, then, to surpass all that, is it safe to say you've been an expert over 70 times and you've done over 30—I'm sorry, over 3,000 forensic evaluations?

A. I have.

Q. Are you limited in the area around Dallas or do you go throughout the state?

A. I do most of my work now in Dallas and Collin County but I have gone around the state as well as Louisiana, Kansas and Oklahoma.

Q. And today you're here because I hired you, correct?

A. That is correct.

[85] Q. Are you frequently hired by the Government or are you frequently hired by the defense or both?

A. About 50 percent of my work is directly from the Court; neither side retained me. The other 40 percent is defense attorneys retain me; about 10 percent is prosecution.

Q. When I hired you, tell the Court what my instructions to you were as far as how you should approach this case.

A. You did not give me instructions. You told me you were going to send me a lot of documents if I agreed to take the case and once I had some semblance of an opinion, to contact you.

Q. Okay. Did I try to lead you to lean one direction or the other?

A. No, sir.

Q. Tell the Court the official definition of mental retardation.

A. There's three definitions but they all converge. I'm just going to give you one, okay?

THE COURT: Fair enough.

A. The first one is there has to be onset of a developmental disability prior to age 18. The second criteria is the standardized intellectual assessment that's usually two standard deviations below the mean, which in [86] most IQ tests, it's going to be around 70 is right where it's going to fall. Also you have to have adaptive deficit in social, practical, conceptual skills.

That is across the board, whether it's the AAIDD, the DSM-IV or the ICD-10.

Q. (BY MR. PEEBLES) And of those three, where is the majority of the emphasis placed?

A. It is now with adaptive deficits or adaptive functioning. That is the primary. It supersedes the, you know, raw intelligence score.

Q. So, is IQ the deciding factor?

A. It is one factor but it's not the deciding factor. Someone could have a lower IQ but higher adaptive functioning and not qualify for a diagnosis of intellectual disability. Conversely, somebody could have an IQ of 75 but have exceedingly low adaptive functioning and qualify for a diagnosis of intellectual disability.

Q. Then what is the practical definition of IQ?

A. The practical definition is the ability to learn, the ability to process, the ability to navigate your surroundings and your life and be effective in what you're doing.

Q. So, would it be fair to say then for a reliable result, you need to have an IQ that correlates to these deficits in adaptive behavior?

A. That is ideal, yes. You want to have a correlation [87] between all the measures.

Q. Okay. Then describe adaptive functioning and how it's related to a diagnosis of mental retardation.

A. Well, as I said, there's really three primary areas in adaptive functioning. Each one of those areas has a lot of subareas. Like in communication, that is one area or practical skills. Can you communicate your needs to somebody, can they communicate their needs to you and you understand them. Do you have the

ability to go into a store and say this is what I want or this what I need, do you have the ability to call a doctor or call a dentist and make an appointment. Those are communication skills, ability to communicate and interact with one another.

Social skills falls also within that category. You have practical skills, which is just everyday living skills, money management, independent self-care, brushing your teeth, taking care of yourself, keeping yourself clean, being able to cook things for yourself. Of course this is in the community, not in a prison environment, per se, but practical everyday skills, using a bus, using public transportation.

Q. Are there any genetic causes of mental retardation?

A. Oh, there's—yes, yes. The most common is Down Syndrome. There's also what's called Fragile X Syndrome. There's a range of genetic conditions that are related to [88] intellectual deficits.

Q. And you and I have had an opportunity in this case to review quite a volume of documents as well as now to personally evaluate Mr. Moore, correct?

A. That's correct.

Q. Have you seen anything to suggest that Mr. Moore suffers from a genetic-based mental retardation?

A. The only thing that I saw was that there were intimations that his mother and, I believe, his sister suffered from low intellect. They have never—in the records it wasn't diagnosed, so there is a suggestion of a genetic linkage; however, there was never any type of diagnosis to show that it was a genetic condition and it was a risk.

Q. So we move out of the area of genetic-based and we move into kind of external nongenetic factors. Which of those are possible bases for mental retardation?

A. The nongenetic environment?

Q. Yes.

A. Yeah, there's a lot of them. I mean, you have low poverty, you have exposure to toxins, you could have a serious illness like meningitis or a high fever that can result in intellectual disability. In addition there are, you know, perinatal and postnatal causes, you know, oxygen deprivation at birth or, you know, toxic exposure while a [89] mother is pregnant can relate to—

Q. And in fairness to Mr. Moore, did you find anything in this case that could—not necessarily that does, but that could be a basis for one of these external factors?

A. Absolutely. I think it was pretty well documented in the record that there was exposure—lead—no, it's not lead exposure. I don't remember the exact exposure. It was toxic exposure within his neighborhood that was documented within the record. There was poverty. No doubt I'm sure there was poor nutrition at times, that was documented, and as I said, there were intimations that his mother and sister possibly had low intellect.

Q. You're not suggesting that every person that's exposed to these things will become mentally retarded, right?

A. No. These are risk factors but a risk factor does not automatically correlate to a diagnosis.

Q. Nonetheless you kind of put it in your toolbox and considered it in light of everything that you saw; is that fair?

A. Absolutely.

Q. Let's talk a little bit about IQ. Is that something that you would expect to see change over time as someone ages?

A. Very limited change. IQ is one of those constructs [90] that has relatively good stability. You'll see some slight variations from day to day, just depending on sleep, hunger, et cetera. But the main core, the range of IQ score that a person's going to have remains relatively stable.

Q. What about the other prong, adaptive functioning? Is that something you expect to see change over time as someone ages?

A. There are slight changes and sometimes there's great changes in adaptive functioning. It's exceedingly rare. I have heard about it. I've never actually seen it myself. But certainly as we live, all of our adaptive functioning hopefully will increase through experience.

Q. So, keeping those things in mind, would someone likely qualify as mentally retarded at one point in time and then at another point in time they're not qualifying as mentally retarded?

A. Unlikely. There are—as I said, there are very few cases where that has happened but it's unlikely and very rare.

Q. What's the standard methodology that you would employ in a forensic evaluation?

A. Always in all forensic evaluations, I do standardized testings. I interview people and I ensure that I do effort testing if it's cognitive-based deficits I'm assessing or outright malingering testing if I'm assessing [91] schizophrenia or some other type of psychosis and there's an alleged insanity or incompetency. So—but the methodology is the same regardless of what type of evaluation I'm doing in that there's always standardized testing, there's always effort or malingering testing and interview.

Q. Now, I'm sure the Court's well aware of this but when you say "standardized testing," you basically mean that these tests have been tried and true and these are what everybody in the professional community has accepted as being valid and accurate; is that a fair summary?

A. That's fair enough, yes.

Q. And the test that you administered ultimately to Mr. Moore, they fall into that category, too, right?

A. Yes, sir.

Q. You mentioned effort testing, sometimes known as malingering. Why do you consider that to be important when you're administering these tests?

A. It's important in forensic context or in disability context, somebody seeking compensation because there is an external motive and the only way you know if your testing is valid and you're giving accurate information to whoever is asking for it is if you do effort testing or malingering testing.

Q. Is there a difference, in your opinion, between those two, effort versus malingering?

[92] A. There is. Malingering is more of an extremed, feigned characterization of symptoms. Often it's comical because you can pick it out immediately. Effort testing is, and also as Dr. Anderson said, symptom validity testing. So it's called different things; you're assessing if effort was put forth on the testing because you don't know, because anybody can take a test and if you don't put forth effort, then you don't really get a true representation of this person's ability.

Q. Another thing you've heard as you've—and you have sat in the courtroom from the beginning of testimony and heard everything every witness has said, right?

A. I have.

Q. Okay. You've heard the Flynn Effect brought up.

A. I have.

Q. Describe for me what the Flynn Effect means.

A. There has been a observation in the research that intelligence is gaining about 3 points every decade across industrialized nations. There is research now that it's starting to slow down a little bit, so I think the Flynn Effect will not be as great in the future, but it just means that tests that were normed at one point in time may not be reflective of the true intelligence of any given age group or cohort now. So, you have to adjust it by 3 points after ten years.

[93] Q. So, it's sort of like adjusting an IQ test based on the inherent changes of your population group?

A. Absolutely. You said that much better than I.

Q. Thank you. What methodology did you employ when you were evaluating Mr. Moore?

A. He was administered what's called the Wechsler Adult Intelligence Scale, Fourth Edition; it's the most current one, up to date. It was released in 2008. I gave him selected subtests of what's called the Wechsler Memory Scales, Fourth Edition. Not all of them. We spent about six hours together and at that point there was just a couple that did not get administered. What I did make sure I administered on that test was all of the subtests that allows to assess for effort. I didn't skip on any of that at all.

There was two things that we were not able to do. I administered what is called the Test of Memory Malingering, which is defined as a effort test, and he was administered the Wide Range Achievement Test, Fourth Edition, which Dr. Anderson administered one subtest of that. And then the Texas Functional Living Scales, which is an adaptive functioning measure. It's not—you know, you ask questions, you ask people to do things for you.

Q. And we'll talk in more detail in a little while about those tests.

[94] A. Okay.

Q. But for now, tell the Court when you did the evaluation and where you did the evaluation.

A. I conducted the evaluation on January 1st, Sunday (sic) of this year, at the Harris County Jail.

Q. Two days ago?

A. Two days ago, yes.

Q. I also provided a lot of documents to review prior to doing any of that testing, didn't I?

A. You did.

Q. And some of those documents actually originated from the defense that I then just passed on to you; is that right?

A. That's correct, yes.

Q. Can you explain to the Judge what those documents generally consisted of?

A. There were school records, past psychological testing results, there was records from TDC, transcripts from the original trial, transcripts from the 2001 hearing, letters Mr. Moore had written to his attorney, motions Mr. Moore had written.

Q. Fair enough.

A. Okay.

Q. And some business records as well, commissary records, disciplinary records from prison?

[95] A. Yes, yes.

Q. At some point did I also supplement those documents with a whole slew of photographs that were taken at TDC from items inside Mr. Moore's prison cell?

A. Yes.

Q. When you reviewed the documents—not asking you about the actual testing that you did yet, but just reviewing the documents that you had, what did you learn about Mr. Moore's intellectual functioning during his developmental years?

A. The only time he was administered a standard IQ test was when he was 13 years old and that yielded a score of 78, which is borderline, Flynn-adjusted, and I'm not sure, and I'm still not sure from looking at the record, if it was the WISC that he was administered or

the WISC-R. Those are, you know, normed at two different times. Benefit of the doubt, say it was the WISC, Flynn-adjusted, we probably take it down to about 69 or 70 but with the WISC-R, probably take it down to about 73 or 74.

He had some other tests administered. The only other two IQ test was the Slosson Intelligence Test and the Otis-Lennon Mental Abilities Test. Both of those are group tests. They don't have high validity. Certainly there is research that the SIT or the Slosson, back in the 1970s, had extremely poor validity in determining mental [96] retardation. Then there was the Bender-Gestalt and the Goodenough Draw-a-Man Test. Those are brief neuropsychological screenings but are not IQ testing.

Q. All right. And so, of all of those, the—I guess what I'm hearing is that you would place more emphasis for your purposes on the very first test when he was 13?

A. That was the only test that was a full-scale standardized test, yes, so that is what I was relying upon.

Q. What are some of the things that could cause a low IQ score in childhood besides mental retardation?

A. Oh, boy. Being a traumatized child certainly can cause low IQ scores. Children who are traumatized have difficulty focusing and learning because their environment is so stressful. Being tired, not getting enough rest.

Q. Did you see anything in any of those documents you reviewed to suggest that Mr. Moore was a traumatized child?

A. I think Mr. Moore was exceedingly traumatized as a child.

Q. For what reasons?

A. I mean, from what I could tell, from what his family had reported, he was abused pretty severely by his father. And I think abuse is traumatizing for anyone.

Q. Just in case anybody in the courtroom's wondering about your responses, I told you before you testified to just tell it like it is, right, regardless of who it [97] benefits or who it doesn't. Isn't that true?

A. And that's what I'm going to do, yes.

Q. Okay. Absolutely. How about IQ testing after he was incarcerated?

A. He had an IQ test which revealed a score of 71. I don't know what type of IQ test it was. They said there was a WAIS in the records but there was no form in there. It may have been a brief one, it might have been a full-scale one, not really sure. Then the next time where I actually have a record, there was an IQ testing done in 1989. That was the WAIS-Revised. And he had a full scale IQ on that, I believe, of 74, non-Flynn-adjusted, but 74 at that time.

Q. What's probably the biggest problem of trying to utilize or interpret IQ scores that were done after his incarceration?

A. Okay. I'm going to answer this as easy as I can. The biggest problem is that certainly when you're incarcerated, you can be depressed. A lot of men and women who are incarcerated have a period of depression that lowers IQ scores. In addition, as I've said before, you don't know the validity of a test if you do not have effort testing associated with it. And I worked

in a prison; you don't give effort testing because that's not the point. The point is to see if you have an IQ score and what is that going to do as far as housing considerations and placement.

[98] Q. Also, in reviewing the documents, what evidence did you find of limitations and adaptive functioning prior to his arrest?

A. I think there were limitations in adaptive—I'm sorry—academic skills in his development and there was some deficits, adaptive deficits I think in social interaction during his childhood.

Q. Did you also see evidence that he was kicked out of his house at a particular time?

A. I did.

Q. And how would that affect your analysis?

A. I don't know specifically what his adaptive skills were from the age of 14 to I believe 17 or 18 is when he was arrested. There isn't a lot of information during that time except he was living in the back of a pool hall, that was told. He was, you know, playing pool for money and mowing lawns. So, there is some ability to understand money concepts and work.

Q. Which kind of leads us into the next area. In reviewing all of the documents you had, what evidence is suggestive that Mr. Moore does have adaptive skills and has used them in the past?

A. Well, as I said, in order to survive on the streets, obviously he had to engage in some adaptive behavior. There's money concepts and work concepts involved [99] with mowing lawns and playing pool.

Q. How about his testimony in his trial?

A. Testimony during his first trial, he was able to respond to the questions posed by both his attorney and the State's attorney and respond accordingly and he was able to conceptualize what was being asked and form exculpatory statements or responses at times, indicating an ability to engage in abstract reasoning to some degree.

Q. And he was questioned by both the prosecutor and the defense lawyer when he testified in that trial, wasn't he?

A. Yes, he was.

Q. He testified for quite a long time, right?

A. I don't know the exact amount of time. The transcript was, you know, fairly long. I did not pay attention to the time limit.

Q. Did you see anything about the nature of the present offense, the circumstances of the crime that would indicate implementing adaptive skills?

A. I think what's been talked about already in court. I mean, as a forensic psychologist, I look at the behavior that surrounds a crime. Wearing the wig, covering up the gun and going to Louisiana all indicate a level of planning and forethought and ability to appreciate the need to do something not to be apprehended and that relates to [100] abstraction.

Q. What about evidence of acquired adaptive skills postoffense; in other words, after he was convicted?

A. Certainly. He's learned how to read and write in prison. As far as all the motions that were composed, I don't know if he wrote those or not. I do have letters that he wrote to significant others or friends of his and I'm making, I think, a reasonable assumption that nobody wrote those for him and certainly he has a

writing ability at this point, you know, that approximates about a seventh grade level.

He was able to somewhat defend himself in court, he represented himself *pro se* for a short time period, so he had these adaptive skills that have developed while he has been in prison or were marginally present before.

Q. And you brought up a point, which is that you don't know personally whether Mr. Moore wrote those motions or wrote those letters but you also don't know that he didn't, correct?

A. I don't know.

Q. And so, is it your belief that given the volume of all this stuff, it's more likely that he wrote it?

A. Some of them are handwritten and I am not a writing expert, but it appears to be in writing quite similar to [101] his. So, I mean, the assumption is that he did write some of them.

Q. Did you review the expert witnesses that testified for the defense in his retrial?

A. I did.

Q. What was their final conclusion on whether or not Mr. Moore met the criteria for mental retardation?

A. Neither one of the experts believed he met the criteria.

Q. Now, in reviewing recent documents, what evidence have you found that supports a finding that he's mentally retarded, meaning have you seen anybody else that has done an assessment that determined he's mentally retarded?

A. No.

Q. Okay. Let's talk about your actual testing.

A. Okay.

Q. That you did on Mr. Moore.

THE COURT: You know what? Let's stop. It's almost lunchtime, since we're sort of switching gears. So, we'll be in recess for 30 minutes.

MR. PEEBLES: I'm not even going to leave, Judge. I'm going to sit right here the whole time.

THE COURT: You are not who I'm worried about, let the record reflect.

All right. We're in recess until—let's say [102] 12:30. That makes it 35.

(Lunch recess.)

THE COURT: All right. If I can have the witness back, please.

All right. And you may proceed.

MR. PEEBLES: Thank you, Judge.

Q. (BY MR. PEEBLES) Dr. Compton, when we left off, I was about to ask you about the actual testing that you administered on the applicant Bobby Moore. When you started that, is there something that you do at the beginning of every single assessment that you also did in this case?

A. Yes. I always give someone a consent form. I ask them to read it. I read it to them. The consent form documents that I'm either retained by the State or the defense or by the Court and that I will be doing psychological testing and I would be assessing their effort on some of this testing and that I'd be submitting a report to parties, or findings to all parties. He had the right to refuse. He did not have to go forward with the

examination and at all times he needed to let me know if he would get tired, fatigued, hungry, needed to get up and stretch, anything to make it comfortable and increase the validity of the testing.

Q. In any of the 3,000 examinations you've done, if you conclude that the subject doesn't understand that form [103] or doesn't agree to what's on that form, then do you continue the testing or halt it?

A. It depends on what type of—I mean, if it's a competency exam, I go ahead, because it's Court-ordered and I have to have it. Otherwise, no, I stop the examination, try to reframe it or I just completely terminate. If they refuse, of course, I terminate the evaluation.

Q. In this case did Mr. Moore understand that form?

A. He asked about two words and the two words that he asked about was "validity," what did that mean, and "distorted," what did that mean. I explained both of those to him, then he read it, signed it and I asked a officer to come in and sign it as well because I always—I try to have a witness sign the consent forms.

Q. So, at the end of that interaction were you comfortable that he understood his contents (sic) and was consenting to go ahead with the test?

A. Yes. I do believe so.

Q. Let's talk about the actual test then.

A. Okay.

Q. How did you begin?

A. You know, first I just talked to Mr. Moore, asked him about his personal history a little bit. I knew quite

a bit. And then we began with testing. And the first thing that I did was administer the Test of Memory Malingering.

[104] Q. Describe for the Court what the memory malingering test consisted of and what Mr. Moore's performance showed.

A. It's a very simple test. You show a person a picture and ask them to remember it. It's 50 pictures, common, like, everyday pictures. Once you're done with that, you show them 50 pages containing two items and then you say, Which one did you just see? It's a test that's really insensitive to brain trauma or intellectual deficits and there is research on this instrument. So you do that, you give them one trial, then you give them a second trial and then 15 minutes later, you do what is called a retention trial, just to see what they remembered.

Q. When you administered to Mr. Moore, what were your findings on that test?

A. On the first trial, he correctly identified 24, which is below chance level and it's suggestive that he was not putting forth full effort. On the second trial, he obtained a score of 40 but the clinical cutoff is 45, so it's just slightly below.

And when you're looking at norms for people who are mentally retarded, if we wanted to say Mr. Moore's mentally retarded, if I wanted to look at that, as far as the research is—indicates, that would just be right on the very edge, I mean, it's just okay performance but nothing that would say, oh, yeah, he's out there, he's [105] malingering. And on the retention trial, it was the same thing.

Q. Did you do any other tests that would be effort testing or malingering tests?

A. Yes. There are embedded measures within the IQ testing and within the memory testing. All of these measures were normed at the same time. It's called the Advanced Clinical System. All of them were normed during the same period of the Wechsler Memory Scales and the Wechsler Intelligence Scales, so they have the same cohorts of people, which is a benefit.

Q. Is it easier then to talk about Mr. Moore's performance on those now or to talk about them as we discuss each test?

A. Probably just talk about them now.

Q. Okay. Then what were the—your interpretation of his results on those embedded effort and/or malingering tests?

A. This is all calculated on base rates; that is, how common you see it in a population. You can either choose a 50 percent base rate, a 15 percent, a 10 percent, a 5 percent or a 2 percent. To give Mr. Moore the absolute greatest benefit of the doubt, I chose the strictest criteria, which is 2 percent. I did not compare him to the overall clinical sample. I compared him to people who were [106] known to be diagnosed with mental retardation so I could compare his performance exactly or compare it comparatively to those who have mental retardation. I also compared it to people who have traumatic brain injury and to those who have an educational level less than eighth grade because I believe Mr. Moore was seventh grade. There's also various norms for people of different ethnic cultures because sometimes that changes. So he was compared

to specific groups and not to the overall clinical sample.

Q. And since you've been in here to listen to the testimony, I think there was some mention that maybe folks that are mentally retarded are not the best candidates to test for effort testing but is what you just said that you kind of took that into account by pigeonholing him into that more specific group?

A. Yes, in some regards but the embedded measures—I want to be very clear about this. The embedded measures, they were normed on people who have mental retardation. The Test of Memory Malingering, they are up and down on the research studies but the primary research studies that I've reviewed, there's a strong specificity rate with that with people who have mental retardation. Now, the Rey Dot Counting Test, no, it has horrible reliability.

Q. Okay. Then let's move into the substantive testing that you did.

[107] A. Okay.

Q. What was the first area of substantive testing?

A. That would be the Wechsler Intelligence Scale.

Q. Describe to the Court how you administered that and what results you saw from Mr. Moore.

A. It has nine subtests, Your Honor, and there's various type of tasks you ask people to do. Some are verbal, some are visual, some are motor skills. It's asking general knowledge questions, math questions, you know, abstract reasoning judgment questions, and you go through all of those testing and then you calculate it and get a standard score and a statistical score.

Q. And what was your interpretation of Mr. Moore's performance on this?

A. His performance on this test, he obtained a full-scale IQ, and I'd have to go back and look but I believe it was 57 and then I adjusted it for the Flynn Effect, so I think it took it down to 54.

Q. Now, did you have any thoughts at that point about getting a result like this on that test in light of the previous testing and documents that you had already reviewed?

A. I was surprised by that result. I thought it would be higher. I fully expected him to fall somewhere within the 70s, based on what I'd seen and based on his history, [108] quite honestly, and education level; so, yes, that was a surprising score to me.

Q. Okay. Is there anything else we should discuss in all candor or fairness with the Judge about this test or does that pretty much summarize what you find important about that test and we can move on to the next one?

A. There's a couple more things about that test that I found important. When I administer the test, there is a subtest called the information subtest and it just asks general knowledge questions and one of them that I found surprising was I asked him what is a thermometer and he said, I don't know. He said, A thermometer, I don't know.

However, in 1989, when he was administered the test, he could describe what a thermometer is. And there was discrepancies throughout the test that I saw that indicated suboptimal performance in addition to the effort testing that was conducted.

Q. Well, what was the next area that you went into?

A. That would be the memory scales and those were primarily administered so I can use the embedded measure just to make sure that my IQ testing was valid.

Q. And did you—I mean, was that a successful test? What were your results and your interpretation?

A. The tests were very similar to the intelligence scale, same type of scores, pretty low, lower than what I [109] expected but fairly low and some indications of suboptimal effort. But not across the board. It was variable effort.

Q. Okay. What's the next area that you would find important to our hearing from your testing of Mr. Moore?

A. I gave him academic testing. His academic testing all fell within the third grade range or second grade. Third grade for reading comprehension and writing skills and second grade for mathematical skills, which is not consistent with his writing that I've seen. And I'm not talking about the motions; I'm talking about the writing to his friends that he's had outside. As I said, when you look at his writing and you calculate what is called the Flesch-Kincaid, and that is readability level, it's at a seventh grade level. So that did not make sense. There was just these areas within the testing that were not consistent and did not comport with what I'd seen.

Q. Okay. And then what's the next area of testing that you went into?

A. That would be the functional living scales.

Q. And Mr. Moore's performance on that test?

A. Two standard deviations below the mean.

Q. That in line with what you were seeing up to that point in your interaction with Mr. Moore?

A. I'm not sure if I can answer that as far as being in line. Part of it, I could not administer, so the score [110] is not an accurate reflection of his abilities because he had never had exposure to a checking account and I believe that's probably true. I mean, he was pretty young when he went to prison, I don't think he's ever written a check and one of the skills is, you know, can you write a check. Another skill is, Read this recipe and punch in the microwave. He never used a microwave before, so that would have been invalid to—so I could not score that, so I had to give him zeros on those areas which deflates—artificially deflates or could potentially artificially deflate his overall adaptive score.

Q. And in fairness, you heard me ask questions of family members about stoves and microwaves and it was for that purpose.

A. Sure.

Q. To show that he didn't have exposure to a microwave, at least that we're aware of, correct?

A. Correct.

Q. So it would have—okay. So you wouldn't have expected him to be able to, on that test, show you how to operate an object he'd never seen or used.

A. No, I would not.

Q. Okay. Anything else about that test that you found noteworthy?

A. I don't believe so. I'll take a look.

[111] Q. And if not, that's fine. We'll move into the next test.

A. No, nothing there.

Q. All right. Then just for reference, you were with him for about six hours?

A. Correct.

Q. And so how far into that six hours are we at this point, roughly?

A. Probably about four and a half.

Q. Okay. So, now you roll into what test?

A. This is really more of—it's called the Advanced Clinical Solutions. It is a subset of the Wechsler Scales because you use some of the information off of the Wechsler Scales to calculate—excuse me—to calculate effort levels.

Q. Okay. How did you administer that test to Mr. Moore?

A. Again, it's the exact same way like with the IQ test or any type of testing. You give them a task, ask them to do it or you ask them questions and they respond to you. Thank you.

Q. Uh-huh. How did you interpret Mr. Moore's performance on that test?

A. As I said, I chose the strictest criterion, which would be a 2 percent base rate. 31 percent of people who [112] are classified as mildly intellectually disabled or mild mental retardation, whatever term we want to use here, 31 percent score at that rate, at 2 percent below the base rate. So, more than 50 percent would perform better than that in that area. Only 6 percent of those with traumatic brain injury have a

score below the second percent base rate. 7 percent of those with an education below eighth grade would score below the second base rate, or second percentile base rate.

Simulators, which just mean people who have been instructed to fake, because all of these, they have, you know, controlled research designs where they have a group and they'll tell a group of people, We want you to fake something and see how it turns out. 22 percent of people who are faking will get a score in that range.

And then the only other criteria that I really looked at was, you know, race and ethnicity and it's 3 percent of African-Americans within the standardized sample would have a score that low.

Q. Did you then go into any other—did you administer any additional instruments to Mr. Moore?

A. Oh, no. That's all of them.

Q. Okay. So, at this point now, you're six hours into your interaction with Mr. Moore and you guys are finished?

A. That's correct.

[113] Q. Describe for the Judge just Mr. Moore's general appearance, his—you heard me ask another question. If a layperson was a fly on the wall watching this, what would they think? How would they describe him? Tell the Judge.

A. I believe they would probably think he was being cooperative with me. He was adequately groomed. He made variable eye contact. He didn't make, you know, real great eye contact but sometimes he did. He responded to my questions. His responding was slow but he responded in a logical and goal-directed manner.

Q. Are there learning disabilities or other reasons that someone may process information slower and not be mentally retarded?

A. Well, sure. There are perceptual deficits that people can have. There are sensory motor deficits that people can have. There are a range of learning disabilities. Depression makes you respond a lot more slowly. Being concerned or being very careful make you respond more slowly. So there's a host of reasons and you can't say that responding slowly is endemic and only endemic of mental retardation.

Q. Okay. And I don't want to ask you just yet what your ultimate opinion is on whether Mr. Moore was—is mentally retarded or not, but suffice it to say that this examination that you did is a very key element of your [114] overall thought process for Mr. Moore, correct?

A. Certainly it's a key element, yes.

Q. Okay. But there's other things that you consider as well.

A. I have to. I can't just rely on my assessment.

Q. And what I want to do with you now is ask you about kind of three general areas.

A. Okay.

Q. One general area is some of the business records that I provided for you to look at. Another area is going to be the photographs that you were given of items in Mr. Moore's prison cell.

A. Okay.

Q. And then the last one is going to be portions of this record, the testimony, the motions of the courtroom proceedings before he got to you, for lack of a better term.

A. Okay.

Q. Fair enough?

A. Sure.

Q. Okay. So, let's first look at the business records that I gave you. Now, one of those was these records right here and this has been admitted as—

THE COURT: Steve, will you flip that screen so it's easier—one of those two; it doesn't matter which one—for me to see that. Thanks.

[115] Q. (BY MR. PEEBLES) Now, this has been admitted as State's Exhibit 23. So, this is in evidence. And do you recognize this as being a packet of commissary records that I've provided you for your review?

A. Yes.

Q. Okay. And you and I have discussed this and would you agree—and this is not for an exhibit but just for assisting in testimony—is this a fairly accurate kind of breakdown of what's in this packet, listing transactions by date, by this—this column is the amount below the $85 limit that that order was and then what page it exists in the exhibit?

A. Yes, sir.

Q. All right. And when we went through this, didn't we agree that all of the lines that are in yellow are orders that Mr. Moore calculated and placed where the order was within $1 of the $85 limit?

A. Yes, sir.

Q. Okay. Having reviewed those records, how did the fact that Mr. Moore was required to itemize and calculate prices play into your analysis on mental retardation?

A. In two ways. First of all, in the testing that I conducted, the academic testing, he was able to do more advanced math at times and then other times missed very simple questions, which was not consistent. When you're [116] looking at the commissary records, whether it's multiplication or he is, you know, adding successive—

Q. Successively?

A. Thank you. Or if he's adding that way, that still requires some level of mathematical skills. And the mathematical skills that it would require is higher than the second grade level that I obtained on the testing.

Q. And in your testing you did require him to perform addition, right?

A. Oh, yes.

Q. And some of that addition involved three-digit numbers, didn't it?

A. Yes.

Q. And some of those Mr. Moore had no problem completing correctly; isn't that accurate?

A. Some of them, yes.

Q. Okay. I'd like to show you what's admitted as State's Exhibit 25. And in State's Exhibit 25, is it fair to characterize these as kind of disciplinary records

from the prison from back when Mr. Moore's Texas Department of Criminal Justice number was 268973?

A. Yes.

Q. So prior to his incarceration on death row.

A. Correct.

Q. On page 25 of this document—and I can zoom in if [117] you need to read it, but do you recall seeing this where there was a disciplinary issue, an offender was found in Mr. Moore's cell and when questioned, he said he was there to play dominoes?

A. Yes.

Q. Okay. Does the fact that Mr. Moore was playing dominoes or that an offender was in his cell to play dominoes have a bearing on your analysis?

A. It's one piece of information and certainly there's some social interaction. Dominoes, you have to count.

Q. I'm going to go to page 43. And this is a letter from the Texas Department of Corrections to the manager of the Two-K Restaurant, right?

A. Right.

Q. And do you remember seeing some indication that Mr. Moore used to work at the Two-K Restaurant?

A. Yes.

Q. Now, two things I'll draw your attention to. On this questionnaire, the manager was asked: What is Mr. Moore's level of proficiency?

A. Uh-huh.

Q. Now, in fairness, there's some boxes here to check and Mr. Moore was checked in the third lowest box.

A. Yes, at "limited skill."

Q. And how does—can you read for the Court and for [118] the record what it defines as "limited skill"?

A. Does simple tasks using required tools. Requires close supervision for more complex tasks.

Q. Okay. So, at least this employer is not saying that Mr. Moore is highly intellectual and independent but he is saying that he can operate in the capacity, I guess, that he was there for?

A. Yes.

Q. Is that fair?

A. Yes.

Q. Over here this says: Are you aware of any discipline problems with the man, correct?

A. Uh-huh.

Q. And this says: Capable of influencing others to dissent, likes confrontation.

A. Yes.

Q. How would that play into your analysis?

A. In that he had the ability, the conceptual ability, to try and influence other people. And that is a conceptual skill in some regards.

Q. In fact, in the—you've heard of the Briseno case?

A. I have.

Q. And in the Briseno case, one of the areas they suggest Courts should consider when evaluating Atkins claims [119] is whether or not somebody has leadership skills, right?

A. Yes.

Q. Or the ability to kind of, well, lead others. And so would this, capable of influencing others to dissent, sort of fall within that category?

A. It's one piece of the pie. It's one piece of information, yes.

Q. Fair enough and I certainly don't want you to overstate anything.

A. Yeah.

Q. All right. In State's Exhibit 24—all right. State's Exhibit 24 would be a similar disciplinary packet from when Mr. Moore's TDC number changed to 663, correct?

A. Correct.

Q. So that would indicate it's after he was placed on death row.

A. Yes, sir.

Q. Okay. Okay. Now, this is—can you read the date on there?

A. January 29th, 1984.

Q. All right. Offender Bobby J. Moore. Says: Psychological review committee, correct?

A. Correct.

Q. All right. Now, rather than read this entire document into the record, which anyone is welcome to look [120] at, let me summarize and you tell me if my

summary comports with what you read: That on January 29th of 1984, they administered a WAIS-R full-scale IQ of 71, placing Mr. Moore within the lower range of normal intellectual functioning. His MMPI profile revealed a protocol that was generally valid with scaled elevations on the psychotic scale, not inconsistent with ethnic and cultural biases of the instrument, chronic personality aberrations, unremarkable mental history, he's generally rational, logical with appropriate responses. Is that a fair summary of this, in your opinion?

A. I think that's almost verbatim what they wrote.

Q. Okay. All right. Now, can you read the date on this?

A. December 1st, 1983.

Q. Okay. And it's a social summary.

A. Yes, sir.

Q. Now, in fairness, what this says at the top is: A social summary is a document completed on all newly received inmates who are identified as probable special needs inmates during the course of the diagnostic process.

A. Correct.

Q. All right. Here's a section where they ask him about criminal history. I know it's small. I'll try to zoom in a little bit.

[121] A. That's okay. I can see.

Q. But I would like for you to read the top line of that.

A. On the advice of his attorney, Inmate Moore preferred not to discuss his present offense during the social services interview of 11-18-1983.

Q. How does the fact that Mr. Moore declined questioning on the advice of his lawyer play into your analysis of mental retardation?

A. It's just one more piece, that he has the ability to understand instruction and conceptualize it and act upon it.

Q. I would like to draw your attention now to State's Exhibit 26. It can fairly be described, I suppose, as disciplinary, library logs and commissary records.

A. Yes, sir.

Q. On page 81, starting on page 81, these look like pages that you've seen before, right?

A. They are.

Q. Okay. So, is this pretty fairly summarized as kind of an offense report within the TDCJ prison? See at the top where it says: Offense description?

A. Yes.

Q. And when somebody does something wrong, they generate a report, right?

[122] A. That's correct, yes.

Q. All right. So, this is kind of an offense report, for lack of a better word, from—where is it? Up here. Can you read that date right here?

A. It's 8-12-1992.

Q. Okay. And the description is that on the date and time above, on this particular row, Inmate Bobby James Moore was ordered by Officer Duff to mop up

some oatmeal in the mainway and the inmate failed to obey the order, right?

A. Right.

Q. Do you remember reading—I think it's eight pages, I think, pages 81 through 88—concerning this disciplinary issue, refusing to mop up oatmeal?

A. Yes.

Q. All right. Can I fairly summarize that—tell me if I'm wrong—that Mr. Moore was ordered to mop up some spilled oatmeal and he responded, I don't have to do that because I'm not a hall porter; I'm a death row porter, so that's not my job. Is that a fair characteristic—characterization, I'm sorry, of Mr. Moore's side of this?

A. Yes.

Q. Would that be yet another factor that you would consider as far as his ability to exercise adaptive skills?

A. Yes.

Q. If you would, please, if you look at the top, I [123] think you can see the title of this form as well as the date off to the right. Can you read that into the record?

A. Sure. It's a disciplinary record and it's January 23rd, 1987. It's the Ellis Unit. Excuse me.

Q. Okay. This one I'm just going to read into the record. On January 22nd of '87 at approximately—

THE COURT: Don't speed through it, though. The poor court reporter.

MR. PEEBLES: Oh, sorry. I forgot we have a court reporter, who's very upset with me.

MR. MCCANN: Your Honor, prior to this going, we're going to read it into the record, is there a second page to this?

MR. PEEBLES: On this one? Yes.

MR. MCCANN: Okay.

MR. PEEBLES: It's actually similar to the last instance where this is the front page of the report and then the whole kind of investigation goes on for a few pages, so.

MR. MCCANN: That's fine. We're just reading the top portion then?

MR. PEEBLES: Yes.

MR. MCCANN: Okay.

Q. (BY MR. PEEBLES) So on January 22nd, 1987, at approximately 4:20 PM, inmates on J-21 were brought down to [124] the day room and told to sit down and face the wall. Inmate Moore, Bobby, jumped up in the day room, yelling, Fuck this; we don't have to do this. Inmate Moore was trying to get the other inmates to join in. I ordered Inmate Moore to sit down and be quiet. Inmate Moore refused, saying, No, we don't have to do this. At this time I left Inmate Williams—I'm sorry. At this time I left Inmate Williams and walked over to Inmate Moore. At this time Inmate Moore turned and went back to where he had been sitting. I once again ordered Inmate Moore to sit down and he refused. At this time I grabbed him by both arms and placed him on the floor facedown.

The portion that I want to direct your attention to is the area where it says, We don't have to do this; Inmate Moore was trying to get the other inmates to join in. How might something like that demonstrate

Mr. Moore's ability to use adaptive skills within the prison?

A. It's social skills as far as trying to influence other people, so it falls within that domain.

Q. Again, I guess just to kind of speed this along, I'm going to refer to the same exhibit. Pages 210 to 216 reference another disciplinary incident. Focus here on June 24th, 1983. And it reads: At approximately 7:45 PM on the above date, I ordered Inmate Moore, Bobby, to return to [125] his cell after showering. Instead Inmate Moore stopped at 3 Row 3 Cell and began talking to an inmate. I again ordered Moore to go to his cell but the order was ignored. After being ignored a third time, Inmate Moore came back to the shower and said, You can't tell me what to do. Come on out from behind those bars and make me get in my cell. You ain't man enough to put me down.

As I was making a security check at 8:20 PM, Inmate Moore said, You get out from the front of my cell, you motherfucker. I wish these bars weren't here.

Having sat through testimony now for a couple of days, you heard us discuss susceptibility, gullibility versus standing up to authority.

A. Correct.

Q. Which of those two categories would this fall in?

A. It's the ability to stand up to authority.

Q. Okay. And then I also had given you a very voluminous package of health records from TDCJ, right?

A. Yes.

Q. Without belaboring the point, can you summarize for the Court, just generally speaking, what your

impression was of reviewing the health records that I gave you?

A. The ones, of course, I was most concerned about were in mental health records. It does appear that—I'm sorry. It does appear that throughout his stay, he has had [126] some withdrawn behavior that is reflective of depression. In 2005 they indicated he had written a suicide note. He denied it, that he did. He has refused treatment. They've never officially diagnosed him with a mental condition but—as far as, you know, depression or schizophrenia or anything like that. They document that most of the times his thought processes are logical and coherent but I do think that there has been a history of somewhat withdrawn and depressive behavior, which is kind of demonstrated earlier in his life as well.

Q. Thank you, Doctor. The next area I'd like to talk to you about are some photographs that were taken a little over a month ago in Mr. Moore's prison cell. And you've seen those, correct?

A. I have.

Q. Just generally speaking, State's Exhibit 31, if you can kind of see that through the glare, this is just a packet of handwritten letters. Is that a fair assessment?

A. Yes.

Q. Do they all appear to be in the same handwriting?

A. They appeared to be when I reviewed it, yes.

Q. Okay. And it's about 64 pages total.

A. Correct.

Q. When you discussed earlier your Flesch-Kincaid?

A. Yes, that's the readability score.

[127] Q. Are these the kind of things you look at to make that determination?

A. I did.

Q. Okay. Explain again what that readability score means.

A. Anybody can do it on the computer. It's on Microsoft Word. It is the—it takes the average number of words, the average number of syllables and divides it and there is a readability score that is produced and that is what is used for most journals, publications for the public. This has been around for several years and it was initially developed through the Army.

Q. Did you also see a—I guess I call it a composition, book? It's many, many, many pages long, appears to all be handwritten throughout, using the same handwriting throughout.

A. Yes, sir.

Q. There was some concern or some intimation that perhaps this writing was not Mr. Moore's writing, that he was simply copying down what someone else may have written?

A. Correct.

Q. Right? And to be fair and honest to everybody in the room, are you convinced that every piece of writing in this packet is the product of his independent thought?

A. No, I'm not.

[128] Q. So, some of these things might have been well-copied by him?

A. Certainly, yes.

Q. Correct? But to just maybe use a couple of examples here and there, this is, I guess—you can't see that but page 29 of this discusses a death row visit, being put in handcuffs, things like that. Do you vaguely recall that?

A. I do.

Q. On page 24 of this exhibit, describe for the Court what that is right there.

A. Somewhere he was either given information, read information—this is a normal distribution of IQ scores. This is very standard as far as the percentage of the population and what each IQ score means. This is very similar or—it's exact to the Wechsler Scales and how it is defined with a deviation of 15.

Q. So would this indicate to you that, from whatever source, Mr. Moore is looking into IQ scores from his prison cell?

A. Yes.

Q. And again, in light of the statement that perhaps this is not Mr. Moore's writing, that someone else wrote these and he was copying them, do you see this line right here?

[129] A. I bought myself a watch?

Q. Yes.

A. Yes, sir.

Q. Do any of the photographs that—I mean, I understand watches may be common throughout the prison.

A. Yeah.

Q. But within State's Exhibit 35, which is a collection of photos of his actual cell, there is a photo showing a watch in there, right?

A. Correct.

Q. State's Exhibit 29. Sorry. 29. This exhibit contains a collection of photographs of various newspaper articles that were found within Mr. Moore's prison cell.

A. Correct.

Q. Have you looked at these?

A. I have.

Q. And some of them purport to talk about death row cases, right, winning an appeal?

A. Yes, sir.

Q. Here's another one, winning an appeal. In fact, this one indicates that there's been some underlining of text.

A. Yes, sir.

Q. Is that specific only to this document or was underlining text something that you found common among lots [130] of these documents and books?

A. It was fairly common within the documents and books that Mr. Moore would underline passages that were important to him.

Q. Okay. In your general experience and history, the fact that text is underlined means that somebody, whoever's underlining it, must be reading it and comprehending what it says; is that fair?

A. I'm assuming they're reading it, yes, and the assumption follows that they comprehend.

Q. At least whatever's being underlined was important to them at that time?

A. Correct.

Q. State's Exhibit 28 shows what?

A. Books that Mr. Moore has in his cell.

Q. Okay. And if we flip through State's Exhibit 28, we'll see that there's a photograph of each book; for example, the interior of that book says what?

A. It's his name, his inmate ID and the date.

Q. And within some of these, we find the same type of notations or underlines or highlights, don't we?

A. Yes, sir.

Q. And I'm not necessarily pointing to the context here of what's being highlighted, just so much the fact that someone is reading this, comprehending and underlining the [131] portions that are important to them at the time, right?

A. Yes, sir.

Q. There's a couple of other exhibits with respect to photographs. I'm not going to put them on the overhead but one of them is a calendar from 2012 to 2013.

A. Yes.

Q. And the other one is a calendar from 2013 to 2014.

A. Yes.

Q. Those would be State's Exhibits 33 and 34, respectively. Just generally speaking, did you find anything in these calendars that would assist your determination of whether or not he's mentally retarded?

A. He made notations on the calendars, understood months, it appeared, and he was able to do testing that demonstrated that understanding when I saw him as well, and there's a lot of writing within some of the calendars as well.

Q. Do any of them have contact—address books or anything like that?

A. Yes, in the back of it there's a lot of contact information with people's names, address, phone number.

Q. All right. Did those appear to be appropriately filled out?

A. Yes, they did.

Q. The last section I want to go into with you is some [132] of the courtroom-related exhibits. Did you review an exhibit, particularly State's Exhibit 1, in which Mr. Moore submitted a typed *pro se* motion for a new trial; specifically referencing details from his trial?

A. Yes, sir.

Q. Okay. And in fairness, if it's typed, do you know for certain that Mr. Moore is the one that typed that?

A. I don't. He told me that he does not know how to type. So, I don't know.

Q. Okay. Nonetheless, it was submitted; it was in his name, right?

A. Correct.

Q. Did you review State's Exhibit 2 here, which, for purposes of—well, the original trial record would be in the first clerk's record at 149 to 151. Now, this purports to be a *pro se* handwritten motion for access to the record.

A. Correct.

Q. Statement of facts and transcript, right?

A. Yes, sir.

Q. Is this the handwriting which is somewhat consistent with everything else that you've seen in this case?

A. It is.

Q. And this is submitted in the name of Bobby James Moore, correct?

[133] A. Correct.

Q. Did you review what's called a motion to suppress hearing where there was a little hearing and the parties in court argued over whether or not Mr. Moore's confession was legally obtained or if it was forced out of him?

A. Yes.

Q. Remember that?

A. Yes, I do.

Q. Okay. From your recollection, was Mr. Moore able to testify in that hearing in a somewhat coherent fashion?

A. Yes. I mean, he was able to withstand both direct and cross-examination.

Q. And Mr. Moore, in fact—State's Exhibit 4 is a statement purportedly from Mr. Moore bearing his signature at the bottom which was admitted at trial as a confession from Mr. Moore and is your recollection of the testimony that the detective that took this said, I typed it based on what he told me?

A. That's correct, yes.

Q. Essentially his words?

A. That's what the officer said, yes.

Q. Now, I want to just take a little bit of time with this, State's Exhibit 5. State's Exhibit 5 is the testimony from the original trial. What is the—can you read the date of this trial here?

[134] A. I'm not seeing it. It's July, 1980.

Q. 10th of July, 1980.

A. 10th. I'm sorry.

Q. Okay. Now, in this exhibit, there's some page numbers here in the bottom left.

MR. PEEBLES: Judge, and for purposes of the record, I'm going to refer to the page numbers in the bottom left of this exhibit and I'll also indicate the line numbers on those pages. So, I have no objection—I don't know if Mr. McCann wants this, but when I'm just reading this, I can agree not to have it recreated by the court reporter. I don't know if you want to do that.

MR. MCCANN: Your Honor, if it's okay, why don't we just recreate it as we go, that way when we cross, it will make sense to someone else reading it.

THE COURT: Okay. That's fine, that's fine.

Q. (BY MR. PEEBLES) Okay. I apologize. I'm talking about State's Exhibit 6 here, same date, the 10th of July, 1980. On page 1810, and I'm going to read from line 3 through 24, and this is the defense lawyer questioning Mr. Moore while he's on the witness stand.

A. Yes, sir.

Q. *QUESTION: Now, you-all had discussions about this case all along the highway; is that right?*

ANSWER: Yes.

[135] *QUESTION: Now when you got here in Houston, did the officer put you in jail and take you to a little room and interrogate you?*

ANSWER: They took me to a little room and told me that I may as well sign the statement since these dudes had identified me being with them. I told them I wouldn't. The one—so he told me I was going to make it or else I would—it would be up to him to make this statement on whatever it called for me to make the statement.

QUESTION: So what started happening to you at that point?

ANSWER: Well, one officer, he told one officer to leave the room and go do something. I don't know what he went to do but he got to hitting me upside the jaw and everything and I still refused to sign the statement and everything, so he took me to another room where there was some typewriters and everything and asked me would I sign. I told him, no, I wouldn't sign it.

Now, on page 1812, at lines 2 through 10, it says:

QUESTION: Now, you've been in prison before, have you not?

ANSWER: Yes.

QUESTION: Is it or is it not—has it become—[136] *isn't it a code with people like you who have been in prison that they don't sign confessions, do you?*

ANSWER: No, I'm quite sure we don't. I wouldn't know how to because I have been to—before to jail. I know how they do things. I know I wouldn't sign no statement.

Now I'll show you page 1821, only to point out that we've now moved to cross-examination here. So, now, we're being—Mr. Moore is being questioned by the prosecutor, something that he would not likely have been prepped for. I'll read from page 1830, line 4 through page 1832, line 13:

QUESTION: Why did you leave your grandmother alone that night? Her daughter—

ANSWER: Her daughter was supposed to be coming over there.

QUESTION: You left her there without even seeing her daughter was there?

ANSWER: She called and she supposed to come by.

QUESTION: How far away does the daughter live, sir?

ANSWER: Coushatta.

QUESTION: She's right there in town?

ANSWER: Right close there.

QUESTION: You came back with your sister close to [137] *the 24th, 25th, 26th or 27th. You don't really remember what day it was.*

ANSWER: Well, like I—have—I'm sorry. Well, like, it have to go between the 26th or 27th at the most.

QUESTION: And you were back how many days before you decided that you had to go back with your father?

ANSWER: Well, we left the same day—on that same night, sir.

QUESTION: That would be the 26th or 27th you went back with Bobby White?

ANSWER: Right.

QUESTION: You heard him testify specifically about meeting your father, Junior Moore, there in a liquor store. Do you recall that?

ANSWER: Yes.

QUESTION: He was right about that, wasn't he?

ANSWER: Right.

QUESTION: And he was right about the trip to Louisiana on that day—whatever day it was—but I think it must be your position he was mistaken about having another passenger in the car?

ANSWER: Well, my little sister was there.

QUESTION: She was there with you?

ANSWER: Yes.

[138] *QUESTION: Was she at the liquor store with you?*

ANSWER: No. We went by the house and picked up my little sister.

QUESTION: He took you there. What day would this be, Mr. Moore?

ANSWER: This would be the 26th, that evening.

QUESTION: The evening of the 26th you now go back with White. Are you sure about that?

ANSWER: I'm positive.

QUESTION: You go back with your father and your sister and the plan was to leave your sister there; is that right?

ANSWER: Right.

QUESTION: How long was she going to stay there?

ANSWER: Well, we didn't make no decision. We just was going to take her out there and if she decided to stay longer, she stay longer.

QUESTION: Did you say that you came back from Louisiana with your sister on that very same day, on the day Bobby White took you and your father and sister back?

ANSWER: Yes.

QUESTION: Made a trip here that day, a trip back over there the same day? Are you sure of that?

ANSWER: I'm positive.

[139] One last little excerpt, page 1836, all on this page, lines 16 through 25.

QUESTION: You had known him since you had been in the penitentiary.

ANSWER: I met him in prison.

QUESTION: You knew who he was.

ANSWER: No, I didn't know him.

QUESTION: Well, how did you meet him and not know who he was?

ANSWER: Common sense tells you you going to meet different people in the penitentiary.

QUESTION: You met him but you never called him by name?

ANSWER: Called him by his name, which was Tony.

Granted, that's not his entire testimony I just read but those are excerpts which probably assisted you in your determination of his mental functioning during the trial; is that fair?

A. That's fair.

Q. Okay. What's your reaction to Mr. Moore's ability to testify in this manner in 1980?

A. As I stated before, he was able to process questions, respond to questions, and it's a pretty stressful experience for most people to testify, especially when you're being cross-examined, and he was able to do that [140] without significant difficulty. He was able to conceptualize the process and he could form exculpatory responses or explanations—alternative explanations, I should say, which, again, indicate an ability to process information, manipulate that information and form a response.

Q. I'll speed it up here a little bit. In State's Exhibit 7, did you review court records where the defense wanted to stipulate to some criminal history and the Court engaged in questioning specifically of Mr. Moore to satisfy itself that Mr. Moore was aware of what was going on and it was his free and voluntary choice?

A. Yes. I want to make sure I'm answering you correctly. You're talking about when they were going to put in extraneous offenses?

Q. They were going to stipulate, yes, to his previous criminal history

A. Okay, yes.

Q. Did you see in State's Exhibit 8, for example, some *pro se* handwritten letters to the clerk purportedly from Mr. Moore, saying that his lawyer, Al Bonner, refused to keep him informed about the case and that he was indigent and that he wanted a copy of his record?

A. Yes.

Q. Did you see a follow-up letter, State's Exhibit 9, [141] where there's another handwritten letter purportedly from Mr. Moore to the clerk saying that he hadn't heard any response and he was asking to get his motion before the Judge?

A. Yes.

Q. Did you see in State's Exhibits 10 and 11 numerous *pro se* motions, some of them handwritten, a lot of them typed?

A. I did.

Q. Do you remember in State's Exhibit 13 there was a hearing on Mr. Moore's request to represent himself?

A. Yes, sir.

Q. Do you recall the Court questioning Mr. Moore at length about his intent and his problems with his lawyer?

A. I do.

Q. Was there anything about what you read that suggested to you that Mr. Moore was unable to understand what the Court was asking him?

A. I believe he was able to understand what the Court was asking him and responded appropriately. Some of the legal issues, he had difficulty understanding.

Q. Fair enough. And then in State's Exhibit 20, contains the testimony of DeeDee Halpin?

A. Yes.

Q. Do you recall DeeDee Halpin's testimony?

[142] A. I do.

Q. What did you find significant about Ms. Halpin's testimony?

A. As with both of the experts, they were attributing his withdrawn behavior to emotional problems and that was not appropriately recognized or appropriately dealt with in his childhood and neither she nor Bettina Wright determined he was mentally retarded. His ability—abilities, I should say, his adaptive abilities have progressed since he's been in prison, indicating a strong ability to learn and that was reflected in their testimony.

Q. Bettina Wright's testimony being in State's Exhibit 21.

A. I'm sorry, yes.

Q. Okay. Do you recall reading the testimony from a witness named Jo Ann Cross? Jo Ann Cross was a London lawyer whose mother had been a pen pal of Mr. Moore.

A. Yes, I do.

Q. And just to summarize very briefly for you, you recall Ms. Cross saying that in the beginning Mr. Moore couldn't hardly read or spell as much but it's really developed, his spelling, his grammar, his language. Her mother and Mr. Moore would discuss books and newspapers that the mother would send to Moore and when her mom died, Mr. Moore wrote to her about her mother's death. Ms. Cross [143] concluded that Mr. Moore absolutely had been able to understand and comprehend. His emotions are appropriate and he had grown immensely as a person. Is that kind of a summary of what you remember?

A. Yes, sir.

Q. Okay. So I think I'm pretty much done with you, which brings us to the million-dollar questions.

A. Uh-huh.

Q. Stepping back and looking at certainly your specific testing of Mr. Moore but in addition, the case as a whole, what's your ultimate conclusion on whether Mr. Moore's mentally retarded?

A. I think there is a greater probability than not that Mr. Moore suffers from borderline intellectual functioning. I do not believe—I do not have the data to support a diagnosis of mental retardation, simply because the adaptive functioning, I think, has been too great. Even before prison, I mean, there's indications of adaptive skills. So, I just—I do not have the adaptive deficits for a diagnosis and the only IQ testing—valid, full-scale IQ testing we had was once in childhood, twice at TDC and then the one that I did.

Q. Is there anything that you—that I have failed to ask you that you find important or relevant to your ultimate opinion that we need to inform the Court about?

[144] A. Not that I can think of right now.

* * *

Q. All right. Let me go over a couple of things. First off, we've actually talked before, haven't we?

A. We have.

Q. And we sent our reports to you as soon as they were physically able or ready for your review, right?

A. I have full faith you sent me everything you have.

Q. Okay. Hid nothing from you. In fact, we [145] encouraged dialogue with our experts and with my staff; is that fair?

A. Absolutely, yes.

Q. Okay. And I want to go back over some things and I just want to make this clear in the record. Is it fair that you don't believe you have enough to make a call one way or the other as to Mr. Moore's mental retardation?

A. I believe that I don't have enough information on his adaptive deficits or adaptive—I do not believe there's enough adaptive deficits to diagnose him with mental retardation. I do think he has below average intelligence but I do not believe there's enough in the record or from what I've seen to qualify for that diagnosis.

Q. Okay. Let's go through some of the record and if some of the assumptions that I think you've been working under were to change, whether that would change your diagnosis. Is that fair?

A. Absolutely.

Q. Okay. Let's go back and start with just a quick summary of the scores.

A. Okay.

Q. That you had. You had an IQ test that you gave to Mr. Moore that scored at a 57?

A. I believe it was a 59 and then I Flynn adjusted and it would be 57.

[146] Q. And just so we're clear, you agree with the Flynn Effect as a principle of adjusting scores and norms?

A. Absolutely.

Q. Okay. So, the Flynn-adjusted score was 57. The standard score—I was correct on this—standard score, not raw, was 59?

A. That's correct.

Q. Okay. Both those scores would, under any diagnostic criteria from a DSM-III through V or the AAIDD—I said it right this time, I think—would qualify as in the range of mental retardation; is that fair?

A. Absolutely, that's fair.

Q. Okay. That score is also consistent with an admittedly earlier and perhaps less useful IQ test, the Slosson that he was given when he was 13, which was also 57.

A. Yes, it is consistent with a Slosson Intelligence Test.

Q. And we agree—I think our own expert agreed that that is not the ideal test, that the best standard is the one you administered; is that fair?

A. I believe that to be true, yes.

Q. Okay. The test that you did administer, you did not complete all of the sections of the test; is that correct?

A. No. You're talking about the Wechsler Intelligence [147] Scale, correct?

Q. Yes.

A. No. I administered all of the nine subtests plus an additional comprehension subtest.

Q. Did I misunderstand when you said you had time to administer six or was that the WRAT that I heard?

A. No, I'm sorry. That was the memory scales. There were two subtests on the memory scales that I was not able to complete, which was a separate test.

Q. Ah, fair enough. Okay. So, you feel comfortable that you administered the full range on the Wechsler that you did?

A. Absolutely, yes.

Q. And you said that on the effort test that you gave, the norm of 45 as a score was slightly above what—the 40 that Mr. Moore gave you on two different occasions; is that correct?

A. The score is what you're talking about?

Q. Yes.

A. Yes.

Q. Okay. So you could not say that he was not—let me rephrase that. That's not, in your mind, proof of one thing or the other. It's simply an indicator that he might not have been performing at his best that day?

A. On the Test of Memory Malingering I think is what [148] you're talking about.

Q. Yes?

A. Yes. There is a moderate indication on two of the trials that there's not full effort. It's not extreme. It's not over the top. It's a moderate indication.

Q. But you yourself said that a fly on the wall would indicate that he was cooperating and was understanding your directions. Is that fair?

A. That's fair, yes.

Q. Okay. Looking at the two tests in between your tests and the Slosson, which are both in the 50s, okay?

A. Yes.

Q. There was an IQ test that was administered later at school?

A. Correct.

Q. And then one that appeared to be administered as a Wechsler-R—

A. Correct.

Q. —in TDC. You did not see any of those actual documents or raw scores, right?

A. I did on the Wechsler.

Q. Ah, okay.

A. There was two in TDC, two Wechsler tests in TDC.

Q. Okay.

A. One they just make a notation of it, okay, and then [149] the second one is the one, I believe, in 1989 where I actually had raw data.

Q. Okay. And that raw data, in '89, was that—both of those scores came down to what in the—if you have to check your notes, that's fine. I just want to make sure. But all of those scores came down to scores, whether Flynn adjusted or not—or let me put it this way. When you Flynn adjusted those scores, they came down to a scoring range that would be within the range for mental retardation?

A. That's correct.

Q. Okay. So, there is not a single score properly reviewed that indicates anything but functioning in

the mentally retarded range whether, you know—and I realize this is an odd phrasing but—high range of mental retardation or moderate or mild.

A. Right. All of the ones that I considered valid, there is this range where he could fall within the borderline range into the mild mentally retarded range.

Q. Okay.

A. With the Flynn-adjusted effect.

Q. Okay.

A. But you have a standard error of measure on all of those tests.

Q. Right.

A. And we give it a general plus or minus 5 but it's [150] actually more specific than that. You have to look at the statistical tables but plus or minus 5 for purposes of ease here.

Q. Okay. And looking at this, I think where your hesitation, if I understand it right, is on evidence of the adaptive deficits; is that fair?

A. Yes. And evidence of adaptive abilities.

Q. Okay.

A. Yeah.

Q. So, let me go through some of the things that you've talked about here and follow up on this and see if it would change your view on some of it, okay?

A. Sure.

Q. In terms of adaptive skills, you counted reporting that he played pool and mowed lawns for a living as evidence of adaptive skills; is that fair?

A. Yes, sir.

Q. So, let me take a general question here first. Can intellectually disabled people handle physical tasks?

A. Of course they can.

Q. Okay. Would you consider pushing a lawn mower a physical task?

A. Of course I do.

Q. Would you consider playing a physical game such as pool a physical task?

[151] A. Yes.

Q. Okay. And let me go further on that.

A. Okay.

Q. Do you know how to play pool?

A. I don't.

Q. Does anyone in your family know?

A. Yes.

Q. Okay. Who taught them?

A. My grandfather taught my father.

Q. And you weren't around to—obviously to see that happen, correct?

A. No, I was not.

Q. Okay. So, you don't know who taught Mr. Moore to play pool?

A. Of course not, no.

Q. You don't know, other than the fact that he actually says that he played pool, you don't know—

really there's no objective way to know how well he did it; is that fair?

A. That's absolutely fair.

Q. Okay. And you don't know if someone else was with him when he was playing and suggesting shots, do you?

A. No, I do not.

Q. Okay. In terms of the lawn mower, do you have children of lawn mowing age?

[152] A. Beyond that, yes, I do.

Q. Ah, okay. And did they used to do yard chores when they were younger?

A. Yes.

Q. Okay. At what age did you let them run the mower?

A. I let my daughter run the mower when she was about 15, 16.

Q. Okay. And not to be sexist, would you have let your—if you had a boy child, would you have let him run it around 12?

A. No.

Q. No?

A. No.

Q. Absolutely. There you go. I did it myself when I was 12 for that, but on a press-start motor, other than making sure that your lever's engaged, would you say there's a lot of skill in that?

A. No. And let me be clear: I think a lot of kids mow lawns.

Q. Okay.

A. And I don't think that is indicative one way or the other that he is or is not mentally retarded but it is a skill that, when you look at the totality is what I'm talking about.

Q. Okay. But it's a low-level skill; would you agree [153] with me on that?

A. Of course it is, yes.

Q. And let's talk about the fountain boy report. Even the equivalent of the McDonald's assistant manager that wrote up this report, okay, said that Mr. Moore had—he had a choice of several blocks. He said he had limited skill as a fountain boy. That means you're running a mop and a pull lever.

A. You're talking about the K-Two (sic) Restaurant?

Q. Yes. That means you're—I mean, a fountain boy runs the lever, the sink and mops?

A. Sure. They have very basic, menial skills, yes.

Q. And that guy, that, you know, equivalent of a McDonald's assistant manager, sat there and said that Mr. Moore had limited skills. Is that fair?

A. Yes, absolutely.

Q. Okay. So, again, not any evidence of higher level functioning?

A. No.

Q. Okay. Now, the fact that some school officials, back when Mr. Moore was actually in school, before he was tossed out, noted problems, although that's a good warning sign, okay, the fact that they didn't diagnose

him formally in the early and mid '70s as being retarded, is that really evidence that he's not?

[154] A. No. You would have hoped, if it were true, that there would have been some indication and he would have been diagnosed and intervention would have taken place. Certainly there are instances where you have to go back and retrospectively diagnose some day because there's a failure.

Q. Let's talk about that. It's pretty clear from the testimony that we all heard that the failure lay with his father, isn't it?

A. Well, I mean from the testimony we heard, his father would not allow intervention in his life.

Q. Okay. So, a person goes undiagnosed through no fault of their own. Is it fair to say that in many cases of intellectual disability that there's not necessarily a cause-effect relationship that you can find. I mean, sure, it would be great if you had one but is it fair to say that you are often presented with a—what they used to call a fait accompli, something that's clear but you don't know the cause?

A. The vast majority of mental retardation we do not know the cause.

Q. Okay. And we hope that that's going to change through research and through documents but right now you're basically dealing with the fact of its existence in most cases as opposed to rooting out the causes?

A. Now you're talking about for an individual specific [155] person the cause, correct?

Q. Yes.

A. Yeah, I mean there's some genetic testing. That's all very much, you know, in the research stages, that's correct.

Q. And there's actually some strong research now about fetal alcohol syndrome?

A. Absolutely, yes.

Q. And one of the primary reasons we now warn pregnant women not to drink during pregnancy?

A. Correct.

Q. But that's ongoing and for the most part, someone of Mr. Moore's generation would not have had a clear cause-effect?

A. No, not unless he had, you know, some of the characteristics of Down Syndrome, correct, or some other genetic condition that physically you can see.

Q. Okay. And looking at that—despite that, you know, commonality, you identified several risk factors that were present, including some indication of a possible genetic link and possible toxic exposure, all of those things actually you did see?

A. That's correct. There were risk factors, no doubt.

Q. Okay. In terms of adaptive deficits, let's take a look at some of the stuff that we talked about in terms of [156] the prison, okay? And I want to make sure I understood what you were saying. The disciplinary reports that Mr. Peebles read into the record and showed you, okay, indicated Mr. Moore getting in trouble, didn't they?

A. Some of them, yes.

Q. Okay. Well, he was written up for one?

A. Correct.

Q. For refusing an order?

A. Yes.

Q. Okay. I know my nephew has been adamantly refusing to do certain things since he was 2. That's not really an example of a skill, is it?

A. Only inasmuch—I mean, it's oppositional behavior and, you're right, 2-year-olds can exhibit oppositional behavior. 80-year-olds can exhibit—it's not specifically indicative of anything except oppositional behavior. Some of the issues with those who have intellectual disability or mental retardation is the complacency and the failure to stand up for themselves. And I think that—and that's just a small piece of my opinion but certainly he has that ability at times.

Q. Okay. But we don't know the context or the backstory of that, neither you nor I, nor, frankly, anyone, since—whether he'd been having a difficult day or personal problems with that particular security officer, do [157] we?

A. No, we absolutely do not know.

Q. Okay. In regards to the testing you did on the math and the examples of the commissary sheets being filled out?

A. Yes.

Q. I want to put something to you, okay? If you look at the commissary sheet as either one math problem or arithmetic problem, okay, more accurately, of adding up how many items you have, then if someone's given that math problem the day before and has 24 hours to work on that math problem, okay, or arithmetic adding problem—it's not even subtraction; it's just adding, okay?

A. Correct.

Q. Would you expect a reasonable rate of success even from someone with intellectual disability, provided they had those skills?

A. Provided they had math skills.

Q. Well, at least arithmetic skills. They could add digit numbers up to, you know, dollars and cents which are two digits past the decimal point?

A. You're asking me if they had 24 hours to calculate, would that be, outside of the range of someone who had those skills?

Q. Correct.

[158] A. No, I do not think it would be.

Q. And you saw Mr. LeBlanc come in and testify that he takes things out of the package and shows each inmate.

A. Sure, uh-huh.

Q. So, there's a visual inspection with someone verifying that the item is there?

A. Correct.

Q. To aid the person.

A. Yes.

Q. Okay. And he also was very clear that he doesn't know whether or not anyone helped him—by "him" I mean Mr. Moore—with his math, does he?

A. As far as on the commissary slips?

Q. Correct.

A. No, he does not know.

Q. Okay. And I want to put that to you.

MR. MCCANN: May I approach the witness, Your Honor?

THE COURT: Sure.

Q. (BY MR. MCCANN) Okay. I want to show you State's 28 and State's 29 and I'm just going to come up and these are the pictures of books and passages and newspaper articles.

A. Yes, sir.

Q. That we have here. There's no indication of who [159] sent these items to Mr. Moore anywhere in these, is there?

A. Not that I'm aware of, no.

Q. Okay. And on newspaper articles, those would also likely be sent to him in mail, would they not?

A. I'm assuming, yes.

Q. Okay. So, you don't know in particular if he had a regular correspondent who did any of the underlining, do you?

A. No, I don't.

Q. You assumed that it was Mr. Moore?

A. I would assume that, yes.

Q. If it was not Mr. Moore, would that take away a piece of the pie that you were talking about?

A. It would.

Q. Okay. And let me also put to you that there are times when, at least for me when I was in law school and we still actually had books as opposed to iPads, where I would underline something I needed to review because I didn't understand it when I was in class. In particular for me, it was the rule against perpetuities,

which is a bizarre, strange thing about trusts and lives and being that I had to wrestle with. And I underlined that to look it up later and try to get someone to explain it to me that was smarter than I.

A. Okay.

[160] Q. Is that also something that people do when they want to sit there and understand something?

A. Absolutely. Highlight, underlining, I mean, it's a basic learning or a pneumonic strategy that we all use to process and learn something that may be difficult for us.

Q. Okay. So, underlining, even assuming that it was Mr. Moore who did underlining, okay, wouldn't that also potentially indicate something he didn't comprehend?

A. Well, certainly it could indicate something he didn't comprehend but it's also something, when we're reading, we underline these things that we know ourselves that we want to go back and review, it involves processing and conceptualization to go back and do that. Planning, forethought, all of that stuff.

Q. And that's fair. I think we're perhaps—and I want you to understand that so many people are not as fortunate as you and some of the other folks who work in this field are, but it is not that an intellectually disabled person cannot process some things, if I understand the gist of this. It is that they process them at a rate so much more slowly than the rest of us that—is that a fair statement?

A. Yes. They process it more slowly and there is a asymptope to their acquisition level.

Q. Could you spell for the court reporter?

[161] A. (Inaudible.)

THE COURT REPORTER: I'm sorry. I couldn't understand you through your laughing.

A. Why don't we just say it? There is a level to what they can acquire as far as their intellectual abilities.

Q. (BY MR. MCCANN) Okay.

A. It's not that you continue to learn and continue to advance, so—

Q. There's a ceiling?

A. Sure, yes, there's a ceiling.

Q. Is that fair? Okay.

And switching gears again briefly, my grandmother used to underline passages of her Bible for her children and that was to inspire them. She used to underline Psalms.

A. Yes, sir.

Q. I think it's a fairly common practice among good grandparents to try and teach their wayward children and grandchildren better behavior. It failed with me but it was—worked well with my mom. Going down that route, would it also be possible that someone who sent someone a Bible would have underlined passages to help someone on death row get through the day?

A. Sure.

Q. Okay. And I want to also talk about some of the [162] testing that you did.

A. Uh-huh.

Q. You actually administered the Texas Achievement Test yourself, and is it TFLS? Is that correct?

A. Yes, we call—it's the Texas Functional Living Scales, yes.

Q. Thank you. Thank you. There are a lot of acronyms. I try to remember—

A. I know.

Q. You consider that a good, valid test, right?

A. Sure.

Q. In your handwritten notes, and if you have to check your test scores there, didn't you indicate that Mr. Moore was two and a half times below—two and a half standard deviations below the norm?

A. 2.5 standard deviations below the mean, yes.

Q. Okay. And in fact, one of those tests was a test for telling time?

A. Correct.

Q. And it actually was this basic. You have a clock with the hands drawn on it and he has to tell you what the time is and he got it wrong?

A. No, he could tell me the time. What he could not do or what he did not do was draw the hands of the clock correctly.

[163] Q. Fair enough.

A. Yeah.

Q. The inverse of what I just said.

A. Yes, he could tell the time.

Q. Okay. And looking at that, wouldn't that be consistent with someone who performs in the range of intellectual disability?

A. Someone, who could not draw the correct length of hands on a clock?

Q. Yes.

A. It could be.

Q. Okay. And someone who scored two and a half times the standard deviation below the norm would also be consistent with that, wouldn't it?

A. Could be, yes.

Q. Okay. In looking at memory, although they're—I think Dr. Anderson did some specific tests on memory and you had done some, too. They indicated that Mr. Moore's memory, although reasonably intact, was not high but probably low to average; is that fair?

A. Low average range, yes.

Q. Okay. So, in terms of inconsistencies between reports that are over a decade apart, is it simply a matter of memory sometimes that one doesn't remember something that one hasn't seen in a long time, such as your issue on the [164] thermometer?

A. That is a form—there's two different types of what we call knowledge. It's crystallized knowledge, just stuff that we know, stuff that we learn, and then fluid, which is the ability to process. Knowledge for words like that, it's rare to just forget it and not know what it is. I found that disturbing. I'll be honest with you, I did.

Q. Okay.

A. And that was just one piece of the—one piece of everything for me. And all of these are small pieces. It's the totality of it all that I was struggling with.

Q. Okay. And let me sit there, not to dwell on a word, but in terms of test taking—

A. Yes.

Q. If you or I took the SAT on any three or four given days, would it be fair to say those scores would vary considerably?

A. They would certainly vary. I don't know how considerably but we would have variation, absolutely.

Q. Okay. And would perhaps a mean of those scores be a more appropriate indication of our actual typical ability?

A. Yes.

Q. Okay. So, looking at the scores that you had before, would it be fair to say that a running mean of the scores, all the scores that you considered valid, would [165] place Mr. Moore in the mid to upper 60s for IQ?

A. Well, possibly. The problem I have is that the score I obtained on the IQ test, I did not consider that to be a valid score because we had some suboptimal performance. I think it's a little higher than that. I think it's higher than that.

Q. Higher than 57?

A I do.

Q. Okay. But that would still be consistent with mid-60s or upper 60s?

A. I would say upper 60s, upper 70s if you took the mean of the two that had been done—well, we could say three, the three that had been done that were valid, full-scale standardized IQ.

Q. Okay.

A. We could get somewhere between the upper 60s and the 70s that would be the mean, I would suspect.

Q. Okay. Let's do it out, if you can. The first one was the 57 on the Slosson?

A. I'm not even considering those.

Q. Okay.

A. Those tests are not valid to me.

Q. Gotcha.

A. I just do not have the validity to—I'm talking about the Wechsler Scales, okay?

[166] Q. Okay. On the Wechsler's?

A. Right.

Q. You feel, though, that even the running mean of those would be within the mentally retarded range?

A. They probably would be, yes.

Q. Okay. That's fair. And in terms of looking at some of the other State's Exhibits—let's talk about State's Exhibit 5, which was the testimony at the hearing.

A. Yes, sir.

Q. You've testified with lawyers before, right?

A. Oh, yes.

Q. Yeah. I'm sorry for you. We spend time working with you to understand the nature of your testimony, right?

A. Not usually. Not with me. But with your defendants, you should.

Q. Okay. So a person who was examined by his own lawyer would logically have had some practice at that before appearing on the stand, right?

A. Sure, yes.

Q. Okay. Would you think it would be a good practice for a defense attorney to run a fellow that was going to be on the stand through some practice cross-examination, too?

A. Yes, I do.

Q. Okay. And since you earlier said that Mr. Moore's memory was pretty much intact.

[167] A. Yes.

Q. Okay? Not phenomenally or, you know, like Kreskin or anything, but pretty much intact, would it be fair to say that when the prosecutor crosses him on his memory, that he's just recounting what he said and did, right?

A. Relying upon his memory.

Q. Right.

A. Yes.

Q. Okay. So, and people with intellectual disability can have reasonable memories, right?

A. Some do, yes.

Q. Okay.

A. Often it's impaired but some do.

Q. Okay. And let's talk about that, too. People with intellectual disabilities are not uniform, are they?

A. No, there's not a unitary—a unitary peg that they fit into.

Q. Okay. And people with intellectual disabilities can show competence in some areas and incompetence in others?

A. Just like all of us, yes.

Q. That's very true. And the pieces of the puzzle that you have looked at, in terms of some of those pieces, if one assumed that he did not do the underlining on the books or the articles, okay, and if one assumed that his [168] skills were always fairly low-level on adaptive behavior, in the job and, you know, the types of things that might have made him some money to survive, and if one assumes that really it's not showing ability to influence anyone where you get yourself in trouble and written up, that's not really mastering the system, would that change your perception at all?

A. If all of that were accurate and true?

Q. Yeah.

A. It may to some degree.

Q. That's fair. I'm going to give you a chance to explain that because I know it's fair. This has been—the nice thing about working with this is we're just trying to get to a truth here.

A. Sure, absolutely.

Q. Or as close as we ever can.

A. Yeah.

Q. But looking at some of this, too, I want you to think about some things in terms of literacy and legal knowledge and skills.

A. Uh-huh.

Q. There were a number of what we would call *pro se*, for yourself, for you, motions and things filed in Mr. Moore's case. There's no real proof that he did any of them on his own.

[169] A. No, I do not know that.

Q. Okay. And in fact, the typewritten ones, our best information is that he does not own nor does he know how to type.

A. That's what I've been told.

Q. Okay. And you heard the testimony of Mr. Fronckiewicz who indicated that at some point there was another individual handling Mr. Moore's affairs?

A. Mr. Harris, I believe, David Harris is what he said.

Q. Harris, that's right, David Harris.

A. Yes.

Q. And looking at those things, if you were to learn that Mr. Moore did not file his own *pro se* motions or pleadings, would that be another piece of the pie that would perhaps alter your perception of his skills and abilities?

A. When you're saying he did not file them, you mean he did not have—

Q. He did not prepare them?

A. He did not write them?

Q. That's correct.

A. Okay. It may. Certainly involvement would still indicate understanding.

Q. Ah, I see your point. But do you have any evidence that he dictated those motions or directed them to-be done [170] at all?

A. No, I mean, there's some handwritten motions. He may have copied them. I don't know.

Q. Okay. You worked in the prison for a while, you said, right?

A. Not here in Texas. In Kansas, I did, yes.

Q. Okay. Did you work on a contract or for the system itself?

A. For the system itself.

Q. Were you familiar with the fact that inmates share pleadings?

A. Oh, absolutely, yes, I'm aware of that.

Q. Okay. And just as I might draw a picture, although horribly, that I saw and tried to recreate it, it is not a higher function to be able to copy a visual image, is it?

A. Depends on the visual image, but I mean—

Q. Okay.

A. It requires some motor skills, it does require some processing speed and it requires some abstraction. It depends on what you're asking. Are you talking about copying a motion?

Q. Yes.

A. —does that require? You know, it requires the ability to write.

Q. Okay.

[171] A. And it may require the ability or it does require the ability to kind of process the symbols on the page, whether you can read them or not.

Q. Okay. Would you say that copying a motion is something within the realm of many people with intellectual disability?

A. No. I'd say it's within the realm of some.

Q. Okay.

A. Some but not many.

Q. Okay. So, if someone else did it or gave Mr. Moore something to copy, would that potentially alter your—the taste of the pie?

A. Yeah, it takes away a piece of the pie, of course.

Q. Okay. All right. You know, one of the things that you had mentioned and I think one of the very obvious truths here is that being on death row has got to be fairly depressing for most people. But you don't have, on any of the records that are in the State's exhibits, there is not an actual Axis I diagnosis of depression, is there?

A. There is not, no, huh-uh.

Q. Okay. And the record that you did point to where he was withdrawn and clearly going through a difficult period was in 2005, wasn't it?

A. Yes, it was.

Q. So, eight years between then and the test you [172] administered and many years after—over a decade between the test the TDCJ administered and that episode; is that fair? In other words, in the '80s they tested him and you tested him in 2013. In 2005

he had a episode that could have been depressive, wasn't diagnosed that way but could have been.

A. Could have been.

Q. But clearly a decade or so in between these tests, right?

A. Yes.

Q. Okay. So, when you saw him, was there any indication of mental disturbance?

A. When you say "mental disturbance," you're talking about any type of, like, psychotic aberration, hallucinations, severe depression?

Q. Yes, yes.

A. I mean, his affect his flat. He seemed a little depressed. He denied it. We talked about it. He said he's had some depression in the past.

Q. Okay.

A. But was there overt and glaring mental aberration when I saw him on Sunday? No.

Q. Okay. Fair enough. And let me go back to the school days. Although clearly there would be reasons for any child to be depressed, given Mr. Moore's home, I think [173] all of us can agree that that was terrible.

A. If everything they said was accurate, it was terrible.

Q. Okay. He was not diagnosed with depression in school, was he?

A. No, there were indications of emotional disturbance, two specifically, and so people were recognizing that we had an emotional disturbance that was occurring. Unfortunately when Mr. Moore went to school,

not a whole lot was done at times when kids had emotional problems.

Q. And also in fairness, there was some indication that there was some stress about—during the integration of his other middle school.

A. Oh, yeah.

Q. Unfortunate, but nevertheless that could have also caused some difficulties for some kids, right?

A. Sure, I think in—yes, of course it could have.

Q. Okay. But looking at that, no contemporaneous diagnosis of something that would have directly affected his IQ scores then, was there?

A. No.

Q. Okay. And I guess this brings me back on this. Schools in general—and although I grant you that they try to be better about these things now—in general if—I [174] don't mean to personalize this. If this was a neighbor's child and the neighbor came to you and said, look, my kid's going through some difficulties, he got left behind this year, his father's been problematic, he's finally out of the house, the school says he's not retarded, would you accept that diagnosis without your own testing?

A. Without my own testing?

Q. Correct.

A. No, I would not.

Q. Okay. Do you think most schools have the staff that are competent to make these determinations? Not that they can't recognize warning signs but to make an actual diagnosis?

A. Are you talking about most schools now or then?

Q. I'll go with both.

A. Okay. I think now, yes, because they're better staffed. As a matter of fact, I think now too many kids are put in special education erroneously.

Q. Okay.

A. Okay? I can only speak from my experiences. I'm around close to the same age as Mr. Moore. My experiences when I went to school, there were special education classes, they were generally reserved—of course this was in Kansas, not in Texas—they were generally reserved for those kids who had what would be considered moderate [175] intellectual deficiencies. The mild ones stayed within the mainstream school and were slow. That's all I can tell you.

Q. Okay.

A. I'm sorry.

Q. So, I guess the answer would be nowadays, yes and then, no?

A. For the intellectual to mild, no, they would keep them in the mainstream.

Q. Okay. I also want to talk about planning and some things that may have gone into some assumptions about that and about abilities related to games, okay?

A. Did you say playing?

Q. Planning.

A. Planning. Okay.

Q. Planning. And let me talk about a couple of examples. There was a disciplinary sheet from one of the State's exhibits that Mr. Peebles read into where another inmate went into Mr. Moore's cell without

permission and Mr. Moore was written up but it was the other inmate, Inmate Swan, who said he went in to play dominoes; is that fair?

A. That's absolutely fair.

Q. So, Mr. Moore never said he went in to play dominoes, right?

A. I don't believe he did.

Q. The guard didn't say he observed Mr. Moore playing [176] dominoes, did he?

A. No.

Q. Okay. And when you're looking at a couple of the other things, certainly Mr. Moore did not get away with any of his oppositional defiant behavior in the disciplinary write-ups you saw, did he?

A. They rarely do.

Q. Okay. He was put on his face once. He was removed from privileges for another time.

A. Yes.

Q. Okay. So, in terms of oppositional—who was that fellow on *Leave It To Beaver?* Eddie Haskell-like qualities, not a smooth operator, Mr. Moore?

A. Well, I would assume not, no.

Q. Okay. And I also want to talk about some of the things in relation to skills and things that you may observe in people when they write. When was the last time you handwrote a letter?

A. December 24th.

Q. A Christmas card?

A. Yes.

Q. Okay. When was the last time you actually wrote a couple of pages on a piece of paper like this?

A. A letter?

Q. Yep.

[177] A. It's probably been three or four years.

Q. Okay. And nowadays we tend to send things by e-mail or typed correspondence, right?

A. Yeah, totally inappropriate, but, yes, we do.

Q. The interesting thing that I was going to point out is that, for instance, on the day you gave Mr. Moore the test, you spent six hours with him, correct?

A. I did, yes.

Q. Okay. And you had to obviously get to the jail and go through the check-in.

A. I did.

Q. And then you had, once you were done, you had to gather up all your stuff, go catch a ride or get a cab back to wherever you were going?

A. Correct.

Q. I guess my point is that in normal life outside of prison, we don't have a lot of time these days, do we?

A. No, I—a lot of us don't.

Q. Okay.

MR. PEEBLES: I'll object to relevance at this point.

MR. MCCANN: And I'll tie it up, Your Honor.

THE COURT: I'm not really sure where you're going, Counsel.

Q. (BY MR. MCCANN) But—so you don't have the time [178] to write a letter but someone sitting in prison has the time to not only write a letter but to write it over and over and over again and practice it until, like a proud child, it looks perfect or as perfect as they're going to make it; is that fair?

A. Absolutely they have the time to do that.

Q. Okay. And if Mr. Moore's—assuming that he wrote his own letters and you saw that Mr. Moore's process for writing such letters involved 10 or 12 drafts of something, would that perhaps alter your thinking on whether or not he was writing at a true seventh grade level?

A. Of course that would depend. It would if every single time he wrote, he had to do 10 to 12 drafts. And there's a lot of writing in his possessions right now. If every single time, I'd say, yes. Now, is there sometimes that it may have been repetitious for him to learn or he wanted to write it to make sure it really was perfect before sending it out to somebody important, that would be different. So that's—I'm sorry. That's a very equivocal answer that I gave you but that's the best I can do.

Q. That's fair. That's fair. Is it possible it could change your perception of the pie?

A. Sure.

Q. Okay. Looking at this, it sounds to me that you have some skepticism based on what you believe to be [179] adaptive deficits and adaptive skills but if some of those assumptions that you made looking at these matters were changed, then that would change your opinion, wouldn't it?

A. It may.

Q. Okay. Thank you.

* * *

Q. (BY MR. PEEBLES) Dr. Compton, when you were talking about your testing for malingering, I think that you mentioned there were some very simple math problems that Mr. Moore could not get correct or did not get correct on the test; is that accurate?

A. That's correct.

Q. Then there were some other math problems with three digits, four digits that he did just fine on; is that accurate?

A. That's accurate.

Q. Those real simple ones that he missed, can you relate that to those weeks and weeks and weeks' worth of commissary reports? You know what I mean?

A. I can say this. It's not consistent. When you miss something like 6 plus 2 or 6 plus 3 but then you can add something that has four digits or three digits, which [180] was on my testing—I'm not talking about just commissary—it's just not consistent with the ability that was demonstrated later in the testing nor is it consistent with the ability to add.

Q. So, would you agree then that it perhaps increases the chance that somebody is not exerting full effort on that test?

A. Yes. And like I said, I looked at multiple pieces on that. It wasn't just one thing or two things. It was several things that I looked at.

MR. PEEBLES: May I just approach briefly, Judge?

THE COURT: Sure.

(Brief pause.)

MR. PEEBLES: I'll find it. One minute.

THE COURT: Take your time.

MR. PEEBLES: Okay. I apologize.

Q. (BY MR. PEEBLES) Mr. McCann had asked you some questions about if something was underlined it could mean that the person that underlined it was—didn't understand it and that's why they were underlining. Do you remember that?

A. Yes, I do.

Q. Is this fair to say, that for that to be true, someone would have to first understand the surrounding [181] context of that underlined portion?

A. Context within the writing?

Q. Yes.

A. Generally that would be true, yes.

Q. And then they would have to recognize obviously that that portion they didn't understand given that context?

A. Correct.

Q. And then most of the time it would indicate that they have a desire to then go find out what it means?

A. Correct.

Q. You were also given the possibility that Mr. Moore received books from an outside source that were already underlined. You remember that?

A. Yes.

Q. Specifically I think the example was perhaps the Bible.

A. Yes.

Q. That was already underlined. Is it your impression, either as layperson or as an expert, when you step back and look at all this evidence, that that's what was happening? That Mr. Moore was receiving these and they were already underlined?

A. I think that would be unlikely.

Q. I'll get it if I need it.

Do you remember an incident where—for [182] purposes of the record, in State's Exhibit 27, pages 117 and 122, Mr. Moore was taken to be evaluated psychologically and when he arrived, he said, no, I've been mis—the guards misunderstand my periods of silence and meditation due to my Islamic practices. They're misunderstanding that for mental illness. It's not mental illness. It's my periods of meditation and silence. Do you recall that?

A. I do.

Q. Okay. So, might that be consistent with Mr. Moore going through the Qur'an or some of these other books and underlining those things for himself?

A. Certainly if he has periods of meditation and religious meditation, that would be consistent.

Q. You were also asked a couple questions about woodshedding. You ever heard that word?

A. Yes.

Q. Okay. Specifically that, well, any good defense lawyer would have woodshedded or prepared Mr. Moore not just for the direct examination but also for potential cross-examination by a prosecutor, right?

A. Yes.

Q. And that may well be true. However, you reviewed State's Exhibit 13, which was a transcript of a hearing when Mr. Moore was brought back to address some *pro se* motions that he had filed; specifically, whether he was going to [183] represent himself or get a new lawyer for purposes of his appeal. Do you remember that?

A. I do.

Q. Is there any reason to think that even if, hypothetically, woodshedding existed at the trial, it would have existed prior to a *pro se* hearing like this?

A. Well, you're saying would somebody have been around to coach him on what to say, what to do and how to behave?

Q. Exactly.

A. Well, he wouldn't have a lawyer because he's *pro se*, so, no.

* * *

[184] Q. (BY MR. MCCANN) Doctor, I think you are far too young to remember this but do you remember getting things you had to copy down in school?

A. Sure.

Q. Okay. Do you remember that they were often very—they were poems or passages that you would copy, like Lincoln's Gettysburg Address, that type of thing?

A. Oh, yes. And there's some indications in his writings of things that are very likely copied, poems or passages.

Q. Okay. And that's State's Exhibit 32 in his book?

A. Yes, I mean—yes, there are indications in there of that.

Q. Okay. So, if someone is copying something, other than what you had talked about before—

A. Uh-huh.

Q. —knowing what the letters stand for, it is something still within the ability of someone who has intellectual disability?

A. If they're just copying the samples, yes.

Q. Okay. Fair enough. And I did want to mention to [185] you when you worked at the prison, was it common, in Kansas, to have visits from religious folk, like priests or reverends, who would go and minister to the inmates?

A. Oh, of course. I mean, there is a chaplain on-site and priests and other religious and faith-based organizations coming on a regular basis.

Q. And in most prisons, and I'm assuming Kansas was similar, there are people of varying degrees of literacy, not just Mr. Moore but others who perhaps did not ever receive an education at all, regardless of whether they were intellectually disabled.

A. That's absolutely correct.

Q. Did you ever accompany them on some of these visits? The clergy?

A. No, I did not.

Q. Would it surprise you if you were to learn that oftentimes clergy will mark a passage in the Bible to assist inmates in their daily devotions or meditations?

A. Oh, no, not at all. I think they're directing their attention to something they want them to focus on.

Q. For instance, an inmate who has bad behavior might be given a Psalm about inner peace?

A. You bet.

Q. Okay. And I think no one is questioning that you approached this with an open mind, but I just want to be [186] clear. You at one point had given a report to Mr. Peebles and I will bring it up to you—

MR. MCCANN: If I may approach?

THE COURT: Sure.

Q. (BY MR. MCCANN) And is this the report that you had given?

A. Yes.

Q. Okay. And in this portion here, let's see if I've got this correct. Limitations.

A. Uh-huh.

Q. Could you read that paragraph?

A. Absolutely. I cannot definitively diagnose Mr. Moore as having or not having mental retardation as the only way to diagnose an individual is to conduct an extensive individual evaluation. However, I can provide a critique of the evidence offered to confirm or disconfirm that Mr. Moore is mentally retarded.

Q. Okay. And certainly you've given some critique of some of the tests and the other methods that were used here but if your assumptions on his adaptive skills were incorrect, then your skepticism of this determination of mental retardation would have to be reevaluated, wouldn't it?

A. If my assumptions about his adaptive deficits or adaptive functioning was incorrect, yes, I would revise my [187] opinion.

Q. And in regard to the *pro se* appearance, certainly he would not have had a Court-appointed lawyer but as you heard from Mr. Fronckiewicz, there was a fellow named David Harris who was actually advising and consulting with Mr. Moore back in those days, wasn't there?

A. My understanding is that there was a couple people that would talk to inmates. I really—I don't know how much that went on and I don't think anybody knows because Mr. Harris is now deceased.

Q. Yes, he is.

A. And Mr. Fronck—

Q. Fronckiewicz

A. Fronckiewicz. He did not actually have first-hand knowledge of that, either.

Q. That's fair.

A. So, I don't know.

Q. That's fair. Doctor, thank you for your time.

* * *

Q. (BY MR. PEEBLES) Mr. McCann had you look at and [188] had you read something you wrote from a preliminary report, correct?

A. Correct.

Q. Did you write that report before or after you went and gave the specific testing to Mr. Moore?

A. That was before.

Q. And the whole point of that was for you to say I can't definitively diagnose him one way or the other because in order to do that, I would have to go give specific tests?

A. Yes. It's unethical for a psychologist to diagnosis anyone without evaluating them personally.

Q. And your opinion today then is based on everything, including that testing, right?

A. Yes, that's correct.

* * *

Exhibit: Compton Curriculum Vitae

Vita

Kristi L. Compton, Ph.D.
Clinical and Forensic Psychology
12830 Hillcrest Rd., Ste. D 231
Dallas, TX 75230
972-960-1472
972-960-1476 (Fax)

Education:

- Wichita State University, Wichita, KS. M.A. in Clinical Psychology (Conferred May, 1997)
- Wichita State University, Wichita, KS. Ph.D. in Clinical Psychology (Conferred on 7-15-2000)

Licenses:

- Texas Licensed Psychologist #32380
- Past Kansas Licensure (currently on inactive status)

Professional Experience:

Indian Alcohol Treatment Services
Wichita, KS (May 1997-May 1999)

- Substance abuse-treatment and court-ordered substance abuse evaluations

Comprehensive Community Care of Sedgwick County
Wichita, KS (May 1997-May 1999)

- Crisis Intervention Specialist (mobile crisis unit responding to law enforcement calls for assistance in acute psychiatric emergencies).

Ulster County Mental Health Department APA-Approved Predoctoral Internship
Kingston, New York (June 1999-June 2000)

- General Clinical and Forensic Psychology
- Court-ordered Substance Abuse Evaluations
- Parental Fitness, (with training on conducting child custody evaluations)
- Competency to Stand Trial Evaluations (supervised training)

South Central Mental Health Counseling Center
El Dorado, KS (July 2000-Sept 2004)

- General Clinical Psychology (ages 8 through adult)
- Court-ordered Substance Abuse/Dependency Evaluations
- Child Custody/Parental Fitness Evaluations, Court-ordered Family Mediation
- Competency to Stand Trial Evaluations
- Involuntary Commitment Evaluations
- Disability Determination Evaluations
- Mental State at the Time of Offense Evaluations

El Dorado Correctional Facility (Maximum Security Unit)
El Dorado, KS (July 2001-June 2003)

- Civil Commitment Sex Offender Evaluations
- Classification
- Post-Adjudicative Psychological Evaluations of Murderers and Sex Offenders

- Clinical Supervisor of Master Level Clinicians

Private Practice
Psychology Consultants
Wichita, Kansas (Jan. 2001-Sept. 2004)

- General Clinical Psychology
- Forensic Psychology

Private Practice
Dallas, Texas (Nov. 2004 to present)

- Forensic Psychology

  Specializing in mental state at time of offense evaluations, competency to stand trial, diminished capacity, sex offender risk assessment, and allegations of false sexual abuse, and mental retardation evaluations.

- Clinical Psychology

  Adult/Adolescent Psychotherapy with specialties in treatment of depression, anxiety, and schizophrenia.

- Disability Examinations

Research Positions:

Comprehensive Community Care of Sedgwick County
Wichita, Kansas (Sept. 1996-Aug. 1997)

- Development of a research protocol to assess the needs of adults with persistent mental illness and children with severe emotional disorders.
- Statistical analysis and recommendations to the County on how to improve community based services.

National Commission Against Drunk Driving
Washington, D. C (Aug. 1997-Aug. 1998)

- Literature review on the incidence, prevalence, and efficacy of interventions associated with drunk driving.
- Rewriting research in lay language for placement on a website designed for law enforcement personnel and those working in the prevention field.
- Development of a research protocol assessing the usefulness of the website with subsequent recommendations for improvement.

Teaching Experience

Wichita State University
Wichita, Ks (June, 1997-May 1999)

- Alcohol Use and Abuse, #336
- Psychology of Women, #543
- Cognitive-Behavioral Therapy Practicum , #834
- Social Psychology, #312
- Psychological Problems in Society, #416

University of Texas at Dallas (current)
Richardson, Texas

- Forensic Psychology, # 428

Publications:

Shore, E.R., & Compton, K.L. (1998). Wadda mean I can't drink and drive: Threat to competence as a factor in drunk driving interventions. Journal of Prevention and Intervention in the Community, 17(1), 45-53.

Shore, E.R., & Compton, K.L. (2000). Individual attempts to prevent drunk driving: Types, efficacy, and a theoretical perspective. Journal of Drug Education, 30(3), 281-289.

Compton, K.L., Snyder, J.D., Schrepherman, L.A., et al. (2003). The contributions of parents and siblings antisocial and depressive behavior in adolescents: A double jeopardy coercion model. Development and Psychopathology, 15, 163-182.

Professional Affiliations:

American Psychological Association- Member
Texas Psychological Association-Member

Community Service

Dallas Challenge-Board Member

IN THE TEXAS COURT OF CRIMINAL APPEALS

Case No. 314483-A

EX PARTE

v.

BOBBY JAMES MOORE,

Applicant.

CAUSE NO. 74,059 AND
IN THE 185TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Affidavit

Declaration of Gina T. Vitale, LMSW, CCFC

I, Gina T. Vitale, LMSW, CCFC hereby state as follows:

1. I have been appointed by the court as a mitigation expert for the defense in State of Texas V. Bobby Moore. I am a master level social worker duly licensed to practice in the state of Texas since 1997. I am also licensed by the American Academy of Forensic Counselors as a Certified Clinical Forensic Counselor. I am a member of the National Association of Social Workers, the National Association of Sentencing Advocates and the National Association of Forensic Social Workers.

2. I currently provide mitigation investigations throughout East Texas, where I have been an

independent contractor since 1999. I have attended and served as a faculty member in numerous CLE-approved training seminars sponsored by the Texas Defender Service, Texas Criminal Defense Lawyers Association and the Texas state bar association. From 1989 to 1993, I supervised behavior management programs and assisted with psychological testing for children with mental health and mental retardation diagnoses at the New Orleans Children and Adolescent Psychiatric Hospital. I was employed by Depelchin Children's Center from 1994 until 1997 where I worked with victims of abuse and neglect as well as children and families involved in the juvenile justice and protective services systems. Additionally, I have provided crisis intervention and counseling to victims of violent crime, domestic abuse and traumatic injury at Memorial Hermann Hospital since 1997 where I am also responsible for conducting assessments and determining appropriate placement for patients seeking emergency treatment for mental illness.

3. I have been asked by the attorneys for Bobby Moore to review all available information and conduct an independent investigation in order to form an opinion regarding Mr. Moore's mental capabilities. In my investigation, I have followed the standard of care required by mental health and medical professionals who may rely upon the investigation to reach their expert opinions. As part of my responsibilities, I have completed the following tasks.

   a) Conducted interviews with Mr. Moore's family to develop an outline of his social history,

including medical history, educational and employment history and history of childhood trauma.

b) Reviewed transcripts of 1983 trial, 1993 Writ Hearing and Punishment Hearing.

c) Reviewed Mr. Moore's HISD permanent file and available school records from siblings

d) Reviewed Moore family medical records from family physician

e) Reviewed affidavits and interview notes compiled by Mr. Moore's previous defense team.

f) Reviewed reports of psychological evaluations by HISD and TDCJ.

g) Reviewed Mr. Moore's complete file from previous and current TDCJ incarcerations.

h) Attempted to locate and interview Mr. Moore's childhood teachers, employers, and family friends. Unfortunately, most of these individuals are now deceased due to the amount of time that has passed.

4. My investigation has uncovered a significant amount of compelling evidence to indicate that Mr. Moore meets the diagnostic criteria set forth by the Diagnostic and Statistical Manual (DSM-IV) as well as the American Association on Mental Retardation (AAMR) which state that in addition to subaverage intellectual functioning an individual must exhibit deficits in adaptive behavior beginning during the developmental period.

Intelligence Quotient

As a child and young adult, Bobby Moore's limited educational achievement and immature social skills were such that educators and therapists in numerous settings identified him as potentially suffering from mental retardation. As a result of recommendations by these professionals, Bobby's IQ was tested on several different occasions.

Bobby's first formal testing is done at Atherton Elementary School in 1966. Bobby is given the Metropolitan Readiness Test (MRT) and Draw-A-Man Test. Although specific IQ scores are not documented, results of the MRT place Bobby in the 9th percentile nationally and performance on the Draw-A-Man test is described as "immature." In November of 1971, while in the fifth grade at Scroggins Elementary Bobby is given the Otis-Lennon Mental Abilities Test, a district wide, group administered, IQ screening tool mandated by the state. Bobby receives a score of 77 The following year, at Alcott Elementary School, Bobby was administered the Slosson Intelligence Test and receives a score of 57, placing him well under the cutoff for mental retardation (HISD Elementary Test Record). This score prompts a referral to the district's appraisal specialist and in January of 1973 Bobby is administered a battery of tests by district psychologists. Results on the Wechsler Intelligence Scale for Children-Revised showed Bobby's full-scale IQ score to be 78. However, other tests results indicate a much lower IQ. Bobby's score on the Bender Gestalt Test indicates a mental age of eight years- eleven months (HISD Psychological Evaluation, 1/24/73). As Richard Borda testified at Bobby's 1993 Writ Hearing, IQ can be calculated by dividing mental age by chronological age. With a chronological age of thirteen

years and three months at the time of testing, Bender results indicate an IQ score of 67. Similarly, on the Goodenough Draw-A-Man test, Bobby's score has a mental age equivalent of nine years and eleven months, indicating an IQ of 71 when compared with his chronological age (HISD Psychological Evaluation, 1/24/73). Unfortunately, despite Bobby's low scores and what Richard Borda testifies is documentation "throughout his records. . . again and again. . . that he probably should be in a special education program" (trial transcript from 1993 Writ Hearing, page87) Bobby receives no special services and continues to be promoted based solely on his age (HISD Permanent Record).

Bobby ultimately drops out of school and his mental abilities are not questioned again until several years after he enters the Texas Department of Corrections. In 1989 a staff member conducting a routine quality assurance audit notes, Scores on an "abbreviated WAIS-R. . . yielded an estimated IQ of 71. . . This patient does not need services for mental illness but may need services for mentally retarded. Recommendation: efforts should be made to obtain records of psychological/educational assessment reports from public schools to determine his level of intellectual functioning during the developmental period. In addition he should be tested in order to determine his current level of intellectual functioning and assess his needs for mental retardation services" (1/26/89 TDCJ Clinic notes). As Robert Borda points out in his 1993 testimony, the error range for IQ testing is 5 points. Therefore, bobby's highest IQ score may have been as low as 73 and his lowest 52.

Adaptive Functioning

The AAMR states that in addition to significant limitations in intellectual functioning, an individual must show deficits in adaptive behavior as expressed in conceptual, social, and practical adaptive skills arenas. While Bobby shows some deficits in all areas of adaptive functioning, his most significant limitations appear to be in communication and functional academics.

Communication refers to an individual's ability to comprehend and express information, spoken, written, and non-verbally. This category also addresses the ability to understand a request, comment or command and react appropriately. It is well documented by family report and school personnel that Bobby's communication skills are severely limited. In addition to a severe speech impediment that sister, Clara Jean Baker, recalls brothers Johnnie B. and Ronnie Moore report, "he had trouble comprehending what was going on" (5/28/00 interview with Johnnie B. and Ronnie Moore). Marcelle Tucker, Educational Consultant for HISD, notes that Bobby is "extremely quiet" and "takes no part in class activity unless called on" (HISD Psychological Evaluation, 1/24/73). Bobby himself recalls these difficulties as a child, explaining, ". . . It seemed like people disliked me. . . I was just shy and didn't know how to communicate." Bobby recalls one of his few friends from childhood, an older boy who is deaf and dumb; "We had a natural communication. . . at first it was hard to understand him, but he used his body to show me what he wanted and the more time we spent, the more I learned to communicate" (5/29/00 interview with Bobby Moore). In addition to these expressive language problems, Bobby's difficulties in receptive language skills are noted in his 1968 school

records. Regarding Bobby's reaction to commands/ requests he is below average in his ability to respond "promptly and willingly" to directions.

Bobby's deficits in communication extend beyond his verbal limitations. In an interview with attorneys, Bobby discussed the evolution of his literacy, "Before I was on death row I could only read small words like 'and', 'cat', 'dog'. I couldn't understand bigger words. I didn't know how to write other than my name" (8/10/00 Interview with Bobby Moore).

> "Bobby writes of his distress when he received his first letter from a family member. . . and could not read it. Bobby asked his next-door neighbor to read it to him and reply on his behalf. Bobby copied the letter out. . . and studied it until he was able to remember some of the words." (From Rowena Orr's notes on 10/18/00 interview with Bobby Moore)

Bobby states that it was this experience, which taught him the importance of written communication. Bobby spent the next several years improving his writing skills. However, it takes several days to compose a letter, "working for hours at a time with his dictionary in hand" (From Jemma Levinson's notes on 5/2/00 meeting with Bobby Moore)

Social skills, which refer to an individual's ability to interact appropriately with others is closely related and often intertwined with communication skills. Social skills include making friends, conducting transactions in public, sharing, cooperation, following rules and showing empathy and compassion towards others. Bobby's social skills are difficult to assess due to his limited interaction with peers and chaotic family

environment. Rampant physical abuse, extreme poverty and domestic violence prevented siblings from interacting with each other and peers in what would be considered a normal childhood fashion. Similarly, it is difficult to assess Bobby's strengths and/or weaknesses in the area of leisure activity. It is clear that Bobby makes poor decisions about peer groups and participating in illegal activities. However, it may be that these behaviors were not the result of bad decisions, but decisions necessary for survival.

Functional academics, Bobby's weakest area, refers to academic skills learned in schools that are necessary for daily living including math, reading, spelling and knowledge of basic geography and health issues. Bobby's siblings clearly recall the difficulties Bobby had in school.

> "As a child Bobby was a slow learner. . . he stuttered badly and had trouble reading writing and comprehending what was going on. . . he realized almost immediately that he was different from the other kids in school because of his slowness. . . He really started feeling dumb because he could not answer any questions in class, and he could not read or write. When other kids saw his weakness they teased him. . . . when he left school he was barely able to read" (From Jemma Levinson memo on 5/28/00 interview with Johnnie B. and Ronnie Moore)

Teachers aware of Bobby's weaknesses made allowances for him in class. Bobby remembers in Elementary school that he was "kept separate from the rest of the class, as he did not fell able to participate. . . . He spent most of the time drawing pictures and listening to special tapes." Bobby recalls

"Mss. Hatfield and Ms. McIntosh were willing to help and he had a different section at the back of the class where he would be given homework cards. . . In lessons Bobby sat right next to Ms. Wagoner's desk. . . Ms. Wagoner would check to see how he was doing. . . she would separate him from the class and go over reading, spelling and math." Bobby "didn't feel comfortable or like he belonged. . . he felt different than the rest. . . it was hard to participate because he couldn't comprehend. . . he would generally be in the corner looking at cards with words on them. . . people would laugh. . . the teacher thought it would be better to distance him."(From Jemma Levinson's notes on 5/29/00 interview with Bobby Moore)

Problems worsened, as Bobby got older. He remembers, "School began to get harder as they began to have tests. It was at this time that he realized that he hadn't learned the things that he was supposed to have learned like reading and writing." In junior high "that was when it really began to show what you knew and what you didn't. . . he felt more outcast because there was so much that he couldn't participate in, such as reading and spelling. In class he would hope that the teacher wouldn't ask him to go to the board" (From Jemma Levinson's notes on 5/29/00 interview with Bobby Moore). Family points out that Bobby's poor school performance was not for lack of trying. Sister, Clara Jean Baker remembers, "seeing low report cards. . . it upset him because he tried. . . Marion would make them sit on the porch and do their homework, Bobby would get frustrated" (From Jemma Levinson's notes on 5/27/00 meeting with Clara Jean Baker). Bobby remembers, "He wanted to learn and would get frustrated. When other children laughed at him it was embarrassing. A few would call him dumb and make him feel different . . . Bobby said homework was OK

because it felt good to learn without people laughing" (From Jemma Levinson's notes on 5/29/00 meeting with Bobby Moore).

School records Chronicle Bobby's inability to succeed in a traditional academic environment. Bobby's results on the 1971 Iowa test of Basic skills indicate that Bobby is functioning below average in every area. The following year, Bobby's scores place him in the fifth percentile nationally (HISD Permanent Record). In 1972 Alcott staff documents that Bobby "needs special placement" due to "reading weakness" but it is not evident that this is ever implemented (HISD Permanent Record). In 1973 Bobby's scores on standardized tests again place him in the 5th percentile nationally and at the time of his 1973 HISD psychological evaluation it is noted that he "does not seem to understand that subtraction is the reverse of addition" (HISD Psychological Evaluation, 1/24/73). In the 1975-76 school year Bobby fails all of his classes but continues to be promoted due to age (HISD Permanent Record). By the time Bobby reaches the eighth grade he is failing all of his classes but one and after failing all classes in the 9th grade, no longer allowed in the family home by his father, Bobby decides to leave school.

Another area of adaptive behavior where we see deficits in bobby's functioning is the category of self-direction. Self-direction addresses whether an individual is able to think and act on his own. Requesting assistance when needed. Problem solving and assertiveness are addressed in this category. Bobby's immediate and extended family agrees that Bobby allowed those around him to make decisions for him. Bobby is described as "impressionable" (From Jemma Levinson's notes on 5/27/00 interview with Larry

Baker); "as far as planning on doing things . . . he was definitely a follower."(From this writer's notes on 6/5/03 interview with Lonnie Moore). Clara Jean Baker recalls, "Bobby wasn't the one to decide things . . . he just went along with the program." Clara also points out that in comparing Bobby to his cousin Keith Snelgro who was only one day older than Bobby that "Keith was always more advanced than Bobby was. . . Keith was a more initiative type of person . . . more a go getter than Bobby." (From this writer's 6/4/03 notes on interview with Clara Jean Baker). School records also indicate deficits in the area of self-direction. 1968 & 1969 conduct records show a below average ability to discipline himself.

Despite teasing at school and frequent bullying, family cannot recall a time that Bobby ever came to them for assistance. Cousin, Parneva Richardson recalls, "everyone knew if you messed with Bobby you would have to deal with his brothers, that's just how it worked, but not because Bobby asked for the help." (From this writer's 6/7/03 interview with Parneva Richardson). In fact, Clara Jean Baker, Marion Moore and Aunt Cloteal Morris agree that, if anything Bobby kept problems from them. Bobby's recollection of his actions also reflects his inability to ask for help in appropriate ways. When kicked out of his parents home, with no where to go, Bobby admits that he sleeps on a car windshield, sneaks into a garage or sleeps in an abandoned building rather than going to friends to ask for help (2/9/00 interview with Bobby Moore).

Bobby's strengths and/or weaknesses in the areas of self-care and home living are difficult to assess due to the family's financial status. Parneva Richardson points out that Bobby's clothes were always worn and

disheveled, but attributes this to the family's poverty and the need for Bobby to share clothes with his nine siblings (6/7/03 interview with Parneva Richardson). It is also noted by several family members that Bobby was known to rummage through neighborhood dumpsters in order to find food. However, Bobby and his family describe this as their only option; the health risks involved were simply not considered. This behavior also goes to Bobby's functioning with regards to health and safety activities- one's ability to care for one's self through basic safety, first aid, and proper diet. Bobby's decision to obtain food out of trash receptacles despite previously becoming ill and his decision to remove his own leg cast after a lawn mowing injury indicate deficits in this area.

Bobby's strengths/weaknesses in the category of household maintenance are unclear. Bobby never lives on his own and is never solely responsible for budgeting, housekeeping, shopping or maintaining general home safety. Up until the commission of this crime, at age 23, Bobby is living in the home of a woman he refers to as his "play mamma". Family points out that in his youth when Bobby would get money from odd jobs around the neighborhood his mother would have to tell him what to buy (6/4/03 interview with Lonnie Moore).

The use of community resources such as banks, parks, public transportation and churches and an individual's ability to behave/interact appropriately when utilizing these services is another indicator of adaptive functioning. The information available makes it difficult to evaluate Bobby's capabilities in this category. We do know that he enjoyed spending time at a neighborhood swimming pool and that he attended church with his Aunt Cloteal when his

mother would allow him. Bobby's behavior in church is described only as "quiet and withdrawn" (6/5/03 interview with Cloteal Morris). There is no evidence of inappropriate behavior at any of these facilities. However, Bobby's reluctance to interact with those around him may be the result of a knowledge deficit regarding appropriate behavior.

The final category of adaptive behavior addressed by the AAMR is that of employment; an individual's ability to hold a job, follow job rules and regulations and be a productive employee. It is clear from interviewing Bobby and his family that he was employed in non-traditional settings. He was paid in cash and was not required to complete a job application. Bobby obtained employment most frequently by approaching neighbors to ask if they had chores he could do for extra cash. Bobby's jobs included bagging ice, mowing lawns and working as a busboy. Bobby remembers fondly working for Mr. Roberts at the local pharmacy doing whatever odd jobs were available. Bobby recalls "at times I wanted to get jobs but I was too embarrassed because I couldn't read or write . . . Bobby went for a job in a hospital, he got a man outside to fill out the form but then got too scared to go in" (From Jemma Levinson's notes on 5/25/00 interview with Bobby Moore).

Causality

Having looked at evidence to support a mental retardation claim, we must now look at possible causes. According to The ARC (formerly the Association for Retarded Citizens), mental retardation is attributable to any condition that impairs development of the brain before birth, during birth or in the developmental period (The Arc, 1993). However, in as many as 75% of the children diagnosed with mental

retardation, causality cannot be determined and research shows that as many as 50% of individuals with mental retardation have been found to possess more than one causal factor. In the case of Bobby Moore, numerous childhood incidents and circumstances are found that can potentially cause mental retardation.

The most commonly recognized causes of mental retardation are *genetic conditions, Problems during pregnancy, Problems at birth, Health problems, Environmental factors and Educational factors*

Mental retardation can be cause by genetic conditions such as Down syndrome, fragile X syndrome, and Phenylketonuria. Mental retardation may also be caused by errors occurring when genes combine or by abnormal genes inherited from parents. In Bobby Moore's case we have no formal indication of the IQ of Bobby's siblings or family members. However, family history and interviews indicate that several of Bobby's immediate and extended family may also suffer from some form of mental retardation or other mental illness. Bobby and his siblings describe their sister Janice as having educational difficulties similar to Bobby's. Interviewer notes from a February 5th, 2000 interview with Bobby's extended family indicate that Bobby's paternal aunt, Hazel Bradford was "as Larry put it, she 'wasn't quite right in the head' and seemed almost retarded" (From Patrick Moran's notes on 2/5/00 interview with the Moore Family). Also, Bobby's mother suffers from such severe deficits in her adaptive functioning that Clara Jean and Larry Baker agree that "Marion likely has some degree of mental retardation" (From Jemma Levinsons's notes on 3/16/00 interview with Larry and Clara Jean Baker). As a result of Ms. Moore's inability to complete

household activities, daughters Clara Jean and Colleen Moore were responsible for paying bills, cooking, cleaning and caring for younger siblings. When limited finances caused the family to lose their home it was the older children who worked to raise the money for rent and ultimately went out in search of a new home for the family.

Mental retardation can result when the baby does not develop inside the mother properly or if problems occur during labor and childbirth. Untreated diseases such as high blood pressure and diabetes in the mother and physical trauma are potential causes of mental retardation. *Unfortunately, very little is known about Marion's pregnancy with Bobby or his delivery. Marion* denies problems with pregnancy but admits to not receiving prenatal care. Mother reports that her two oldest were born at home and that "when she went into labor with Clara Jean she went to the bathroom because she didn't realize. . . After Clara Jean, Marion. . . was able to keep track of the months because she knew what was happening" (From Jemma Levinson's 5/27/00 notes on interview with Marion Moore). Due to Marion Moore's limited knowledge of appropriate self-care during pregnancy and the violence she experienced at the hands of her husband we cannot rule out the possibility of mental retardation caused by prenatal trauma and/or untreated maternal illness.

Mental retardation can also be caused by extreme malnutrition, lack of appropriate medical care, or by brain trauma. Diseases such as Whooping Cough, Meningitis and extreme fever that goes untreated can also cause mental retardation. The lack of food in the Moore home is well documented. Ronnie Moore remembers, "We spent a lot of time with no adult supervision. . . there were many nights when we did

not get to eat dinner because there was not enough money to buy food." (429/92 Affidavit). Colleen states, "We always seemed not to have enough to eat" and handwritten interview notes in the attorney file state that family "didn't eat because mother didn't have money for food." In a recent interview with this writer, maternal second cousin,

Cloteal Morris stated "I remember when the kids were very small. . . . they didn't even have an icebox . . I just thought that was terrible and I was busy with my life. . . trying to work and go to school but I'd see them as very young children running around in their diapers. . . nobody paying attention. . . one time they had no electric and they had a bucket of fire in the middle of the room to keep warm. . . I used to drop off sandwich meat and bread and stuff because I figured that was the kind of thing the kids could fix themselves" (5/23/03 interview with Cloteal Morris).

Siblings recall that the lack of food in the home often meant that they would look for food in neighborhood dumpsters. Marion Moore and several of Bobby's siblings recall Bobby getting Ptomaine poisoning after eating from trashcans and requiring hospitalization on at least two occasions. Family recollections are supported by school records, which indicate that Bobby's nutritional status is "poor" (HISD Medical Exam).

Also, Marion Moore admits to a fear of hospitals, which often prevented her from getting adequate medical care for her children. Bobby's 1975 Hartman Jr. High Health record indicates that no immunizations were received for the previous ten years. Also, family recalls Jessie Moore suffering from an umbilical hernia at birth. Marion did not take him to have the hernia repaired until Jessie was sixteen years old

and it was interfering with his daily life (5/27/00 interview with Marion Moore).

There is also an indication that Bobby may have received numerous head injuries which Robert Borda testifies, "can certainly affect" IQ (Testimony of Robert Borda, PhD, at 1993 Writ Hearing, page. 97). Brothers recall the degree of family violence, stating that Bobby would get "beaten up by his older brothers. . . his father would also hit him with things, sometimes in the head. . . he was left bruised and injured from many of these beatings." (From Jemma Lævinson's notes on 5/28/00 interview with Johnnie B. and Ronnie Moore). Bobby also suffered a significant head injury while attending Scroggins Elementary School. During a race riot, Bobby was hit in the head and face with a brick and a chain. Family disagrees on whether Bobby received immediate medical attention and cousin; Parneva Richardson recalls that he was more withdrawn after that event (6/4/03 interview with Parneva Richardson). Jean also reports that Bobby fell off a train that same year, hitting his head. Again, he received no medical attention. (4/13/93 letter from Cotton Bledsoe to Robert Borda)

Environmental factors, such as socioeconomic status, access to health care and exposure to pollutants are common causes of mild forms of mental retardation. Community resources indicate a number of opportunities for exposure to toxins in the life of Mr. Moore and his siblings. During his childhood, the Moore family lived in the area of Houston known as the fifth ward. In the last five years the city has found nearly 90 homes with lead contaminated soil resulting from operation of the MDI Steel Casing Company in the area from 1926 until 1992. It is not known if any of the Moores' homes were found to have lead

contamination. Bobby also had the potential for exposure to environmental hazards while attending Scroggins Elementary School. Bobby's attendance at the school was prior to the removal of asbestos from the building (Houston Chronicle article 8/2/85 by Dianna Hunt: violations charged in Asbestos removal). Additionally, Scroggins Elementary is on the same street as Ware Electro Plating, and 83 year old company that city officials sate is "one of the worst sights. . . for environmental violations. . . they have a total disregard for public health." Most recently the company has been sited with allowing cyanide to run off into neighborhood drainage ditches. We do not know what violations may have occurred during the time that Bobby attended Scroggins and walked from his home to the school daily (Houston Chronicle article on 1/27/99 by John Making: Authorities say plating company letting cyanide foul ditch/ Firm located near a ship channel-area residential neighborhood).

Finally, the absence of adults willing or able to foster mental acuity and encourage appropriate adaptive behaviors can also cause mild forms of mental retardation. There is no question that Marion and Ernest Moore's participation in Bobby's academic life was minimal. Bobby remember that his father was often out drinking and that his mother "would work from 6am to 7pm daily and when she came home she would see very little of the kids" (From Jemma Levinson's notes on 2/19/00 interview with Bobby Moore). Marion Moore admits that she "never helped him and never forced him to do his homework mostly because she was at work and when she got home she was tired" (From Jemma Levinson's notes on 5/29/00 interview with Marion Moore). Clara Jean does not place the blame on her mother who she recalls was a hard worker but states, "my father never gave Bobby

the supervision, support or nurturing that a good father should give his son" (3/31/92 affidavit of Clara Jean Baker). Perhaps the most telling evidence of Bobby's lack of parental support is the signature of Clara Jean Baker, Bobby's older sister, as his parent or guardian.

Based on the above, it is my opinion that there is a wealth of information from a variety of sources to support Mr. Moore's claim of mental retardation. It is my opinion that Mr. Moore should be granted a hearing before the court to address this issue.

This declaration is respectfully submitted on the 16th day of June 2003.

/s/ Gina T. Vitale
Gina T. Vitale, LMSW, CCFC

SWORN TO AND SUBSCRIBED before me on the 16th day of June, 2003.

/s/ Diana Sobotik
Notary Public

[Seal]

AFFIDAVIT OF DR. RICHARD GARNETT

REVIEW OF CASE FOR BOBBY JAMES MOORE

My name is Dr. Richard Garnett. I am over the age of eighteen. I have first-hand knowledge of the facts and opinions asserted in this affidavit.

I hold Bachelors, Masters and Doctorate degrees in Psychology, and have taught at the graduate level at the University of Miami, South Florida School of Professional Psychology, Florida International University, and Texas Christian University. I have thirty-five years of professional experience working with people with mental retardation. I have served as a psychologist and diagnostician, a counselor and therapist, a juvenile probation officer, and as a consultant and trainer in the field. During my thirty-five years of experience, I have served on committees and Boards of Directors for local, state, and national organizations that serve or represent people with mental retardation. I have developed curriculum and taught courses throughout the country for graduate college programs, criminal justice, law enforcement, and child protective services caseworkers, all with at least some focus on people with mental retardation. In my clinical practice over the last thirty years, I have seen hundreds of people with mental retardation for a wide variety of reasons, including stress, abuse and assessment. I have enjoyed being an advisor, friend, and counselor for members of Advocates United of Tarrant County and currently serve on the Board of Directors for the Texas Self Advocates, both active organizations whose memberships are made up of people with mental retardation. I am past-President of the Texas Association on Mental Retardation, President of The Arc of Texas, Chairman of the Fund Development Board of The Arc of Texas, a member of the regional

Medicaid Managed Care Advisory Council for HHSC, and a member of the Mental Retardation Public Advisory Council for the Texas Department of MHMR. I was recently re-appointed by Governor Perry to the Board of Directors for the Interagency Council on Autism and Pervasive Developmental Disorders.

I have reviewed materials sent to me from George McCall Secrest's office, information reflecting academic, behavioral, and professional records for Bobby James Moore. My review included an evaluation of various reports and records from the Juvenile Probation Department, Texas Department of Criminal Justice, and court transcripts. I reviewed various court filings, motions and responses, along with reports from medical, psychological, and educational resources. My evaluation also included review of assorted interviews with family members and friends.

I conducted this review in an attempt to determine whether there was sufficient evidence to support a motion for a hearing to determine whether or not Mr. Moore might meet the criteria for mental retardation as defined by current psychological theory. It is my professional opinion that there are sufficient indicators to suggest that Mr. Moore suffered from mental retardation during the developmental period and into his adulthood, and should be allowed the opportunity to submit such a motion to the court.

School records consistently reflect an inability for Mr. Moore to succeed in the academic setting from his first experience in Kindergarten. At age 5, his kindergarten teachers were expressing concern of possible mental retardation. After being retained in the first grade due to poor grades, he was socially promoted or "promoted on age" every year thereafter until be dropped out of school in the ninth grade.

Each year, grades were consistently D's and F's, with occasional C's.

Grade Equivalents were also reflective of Mr. Moore problems. A Grade Equivalent is a measurement used in education to reflect a student's accomplishments. The Grade Equivalent numerically reflects the grade level that the student's achievements fall within. Mr. Moore consistently through the years was shown to be 2 to 3 grades behind his then grade level. He would be shown farther behind if one were to compare his Grade Equivalent scores to the grade he chronologically should have been in.

In addition to the low grade equivalent scores and his poor grades, Mr. Moore's performance on the Iowa Test of Basic Skills (ITBS) consistently reflected problems in basic skills, In Grade 3, when by age criterion he should have been in grade 4, he scored at the 2.6 grade level on the ITBS. He had a chronological age at that time of ten years, six months, and was in classes with 8 and 9 year old children. In Grade 4, he scored at the 3.0 grade level. In grade 6, at a chronological age of 12, he scored at the 4.4 grade level. It was evident that each year he fell further behind, while making largely D's and F's along with social promotions.

His academic records reflect a number of IQ scores. At age 12, when his reading skills and abilities were shown to be at the second percentile (less than ninety eight out of a hundred), he obtained an IQ score of 77 on the Otis Lennon Mental Abilities Test. This is a group paper-and-pencil tests of general mental abilities which requires one to read the test and answer the questions. Due to the ongoing evidence of his inability to read, this score is questionable as to its validity. Other test scores reflected in the records during his

sixth grade year, the last year he passed any classes at all in public school, were as follows:

Slosson IQ 57

WISC IQ 78

Bender IQ 67

Goodenough IQ 72

In a Houston ISD Psychological Evaluation report dated January 24, 1973, when Mr. Moore was 13 years, 3 months, several observations and recommendation were made. One observation was that Mr. Moore "does not seem to realize that subtraction is the reverse of addition". The report noted that Mr. Moore "could work on this level (second grade) if he has enough pre-vocabulary work". It went on to note that Mr. Moore "needs regular language development".

The recommendation in the Houston ISD report suggested that they needed to "daily drill (overteach) such things as days of the week, months of the year, seasons, standards of measure, telling time, etc. What comes before Monday? What comes after?" It seems clearly apparent that at age 13, these simple basic concepts and skills that one usually learns not only in school but in day to day living were not in evidence or were significantly deficient.

It is clear that the preponderance of the indicators, particularly when combined with Mr. Moore's academic record, indicates substantive limitations in learning and progressing during the developmental period. Those indicator also clearly establish a pattern of significant deficits in intellectual development.

Review and evaluation of records from TDCJ further underscore deficits in Mr. Moore's intellectual and mental processes. Two recorded IQ scores, one from

a brief version of the Wechsler and the other from a full Wechsler test administration, were 71 and 74 respectively. A psychologist noted in 1989 that "he may need services for mental retarded (sic)". Another psychologist's note said that "his responses were appropriate to his 9th grade educational level and indicated IQ of 71."

In addition to having these various reported IQ scores supporting a diagnosis of Mental Retardation, Mr. Moore has exhibited significant limitations in adaptive behavior in several areas of his life for as long as records have been retrieved. There are sufficient historical references to his inability to live effectively in society and to manifest a variety of conceptual and practical skills. From both the perspective of the American Association on Mental Retardation and the American Psychiatric Association, Mr. Moore meets or exceeds threshold diagnostic criteria in the area of adaptive behavior deficit.

Interviews and anecdotal reports from family and friends consistently paint a picture of intellectual and academic challenges in an environment of extensive and pervasive physical and psychological abuse. Comments such as the following underscore Mr. Moore's deficits.

> "It was hard to participate because he couldn't comprehend."
>
> "If a teacher asked him to "try" to read out loud, the children would laugh."
>
> "He got teased for being "dumb" and punished by his father who called him "stupid".
>
> At age 13, records indicate that "he needs special placement".

"Bobby did not like school and felt like he didn't belong."

"He felt different from the rest."

He "realized that he didn't have the ability to learn and felt frustrated in school".

He "felt embarrassed because he couldn't read or write".

Reflections and anecdotal remembrances were consistent and similar. Further, the memories of the environment were the same: abusive and unhealthy influences. The significance of the environmental issues are found when one considers the etiological factors that can lead to Mental Retardation. When Mental Retardation is being considered, it is important to look at possible causative factors which become a part of the overall assessment. They become validations and confirmations for the diagnosis. In Mr. Moore's case, indications of etiological causation is extensive. The following will outline the risk factors typically considered in looking for causation, understanding that the more extensive and/or signficant the factors are in a person's life, the more confirmational they become of the diagnosis.

BIOMEDICAL

Prematurity, Neonatal Disorder, Traumatic Brain Injury, Exposure to Chemicals

SOCIAL

Poverty, Maternal Malnutrition, Domestic Violence, Impaired Child CareGiving, Lack of Adequate Stimulation, Family Poverty, Chronic Illness in the Family

BEHAVIORAL

Parental Alcohol Abuse, Parental Rejection of Care Taking, Parental Immaturity, Abandonment and Rejection, Child Abuse and Neglect, Domestic Violence, Inadequate Safety Measures, Social Deprivation

EDUCATIONAL

Lack of Preparation of Parents for Parenthood, Impaired Parenting, Inadequate Early Child Care, Inadequate Special Education Services, Inadequate Family Support

OTHER

Exposure to Chemicals and Environmental Toxins, Substance Abuse, Negative Social and Peer Group Influence, Malnutrition

It is stunning how many of these etiological factors were present in Mr. Moore's life, from birth into incarceration. If there were, as some have suggested, comorbid conditions such as learning disabilities or mental illness, then the confirmational power of these factors is overwhelming.

From the stand point of the Diagnostic and Statistical Manual of the American Psychiatric Association — Fourth Addition (DSM-IV), Mr. Moore has historically manifested deficits in "adaptive skill areas" such as social and interpersonal skills, use of community resources, self-direction, and work. The requirement for a diagnosis of Mental Retardation in the DSM-IV requires significant deficits in only two of eleven adaptive behavior areas. Mr. Moore has exceeded that threshold, concurrent with a variety of IQ scores within the range of diagnosis, over virtually his entire life.

From the stand point of the American Association on Mental Retardation, 10th Edition 2002 Manual, Mr. Moore has historically manifested deficits in the "Social Adaptive Skill Area" in general, and in specific areas of both the Conceptual and Practical realms. The requirements of the AAMR Manual require significant deficits in one of the three major areas of adaptive skills. For Mr. Moore, this has primarily been in the Social Adaptive Behavior Skill Area, which includes problems in areas such as interpersonal, responsibility, naiveté, follows rules, and obeys laws. Specific deficits have also been historically recorded in self-direction, occupational skills, use of community, and maintaining a safe environment. It could be argued that he has also manifested deficits in functional academics and health & safety. This pervasive pattern of deficit clearly exceeds criteria.

As a result of this assessment of the material submitted for review, it is my professional opinion that there is sufficient evidence to suggest that Mr. Moore has mental retardation, and should be allowed the opportunity for a full hearing in that regard before the court.

/s/ Richard E Garnett
Richard E Garnett, Ph.D.

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Richard E. Garnett, on this the 16th day of June, 2003, to certify which witness my hand and seal of office.

My commission expires 5/27/05

/s/ Katrina Peacock
Notary in and for the State of Texas

REPORTER'S RECORD
VOLUME 29 OF ___ VOLUME(S)
TRIAL COURT CAUSE NO. 314483

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

BOBBY JAMES MOORE,

Appellee

v.

THE STATE OF TEXAS,

Appellant.

PUNISHMENT PROCEEDINGS

On the 12th day of February, 2001, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Larry Fuller, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

* * *

[6] BETTINA WRIGHT
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. MORROW) Please state your name for the jury.

A. My name is Bettina Wright.

Q. How are you employed, Ms. Wright?

A. I am a clinical social worker in private practice.

Q. Can you tell us about your educational background?

A. I have a Bachelor's Degree in psychology from the University of St. Thomas here in Houston and a Master's Degree in social work from the University of Texas at Austin.

[7] Q. Tell us about your private practice. What do you do in that practice?

A. I have been in private practice for about five years. It's a solo practice. I see a variety of clients from teenagers well into adulthood and people into their sixties and seventies. It's a very varied practice. I have an extensive background in the area of chemical dependency and addiction. I deal with childhood trauma, child abuse, recovering from sexual abuse.

Q. At my request, did you have an opportunity to look at some records about Bobby Moore?

A. Yes, sir.

Q. And also to meet with Mr. Moore?

A. Yes, sir. I met with Mr. Moore twice.

Q. Let me ask you, Ms. Wright, we're talking about someone's childhood, what are the three basic—what are the basic—what are the things that someone needs to grow up healthy and well?

A. Well, according to basic psychological theory, there are three areas that are important in the development of any child biologically, ego and environment.

Q. When you talk about biological what does that address?

[8] A. Basic biological needs being met, whether they're fed, clothed, housed, and what kind of physical limitations they might have, health of course.

Q. Ego, what does that refer to?

A. Well, that's socialization, how we live in the world, how we think, our ability to think. Education plays a part in that, what we learn.

Q. And what was the last area you mentioned?

A. Environment or experience. Which plays an important role in what I believe about myself, how I grow up, what I see, what—how I view the world. Because a child's experience is what they experience. They don't have any frame of reference to see that differently or that there are different ways of—that people live.

Q. And looking at the records and speaking with Mr. Moore, do you have an opinion as to how he fairs in each of these three areas? Let's talk about the biological one first.

A. Well, biologically, I think he was—my opinion is, nonmedically, he was born with everything he needed. He was born basically healthy and didn't have any physical limitations. Whether he was well fed and kept safe is, you know, a matter of opinion, but I think biologically he basically has everything he [9] needs.

Q. So to tilt the biological area against someone you have to talk about some sort of birth defect or physical deformity; is that correct?

A. Or extreme poverty severe neglect, malnutrition, that sort of thing can affect.

Q. To an extreme level;—

A. Yes.

Q. —is that correct?

A. Yes.

Q. Now, the second area was ego. What did you find in your work there?

A. Well, I think the educational system did Bobby a grave disservice. He was socially promoted through school. My opinion is he probably had suffered from some learning disabilities that were never diagnosed as a child, and he didn't learn. He didn't progress in school. The records actually say social promotion took place consistently. He didn't learn how to write his name until he was in the fifth grade and he was isolated in classes. He understood that to be because the teachers were trying to protect him, but the result was he didn't learn anything. He was diagnosed as retarded.

Q. How can that affect a child's perception and [10] his ability to cope in later life?

A. Well, Bobby, I don't believe, really had any sense of himself. There was no sense of self-esteem. There was no—he didn't learn it. He was okay. He saw himself as different, incompetent. The more children learned around him the more deficient he saw himself as because he was not learning and keeping up.

Q. Are those the primary findings you made on the ego aspect or are there others?

A. Really, the biggest deficit he had in that area is education.

Q. How about the environment or experience?

A. His environment was extremely dangerous in his childhood. When I asked him how to—give me a couple of words to describe your childhood he said

scary. His father was violent, violent with the children, and violent with his mother. And safety is probably the most important things that you can provide for a child. His family was disjointed. A couple of his brothers were raised by someone else. As they got older the mother distributed the children around among different people. Which I understand she needed to do. But he didn't know where his family was. His mother was out of the house working most of the time. His father was drinking and violent and neglective. [11] There was no sense of safety in terms of where he was or who he was or how he was.

Q. Now, what is—how does this lack of safety translate into either later behavior or behavior even as a child or young person?

A. Well, we will seek safety first. It's more important than love. It doesn't matter whether I'm loved if I'm not safe. And I—the way he described it, I saw his childhood as pretty terrifying. A child is completely dependent on their environment and completely vulnerable so he had nowhere to go. He described a sister who really was the person who brought him up. And her availability was, of course, limited. She was a child herself.

Q. Is there any relationship between the lack of safety and the other two we talked about, the ability to do well in school and perception of himself.

A. There was some mention in some of the school records about he was very quiet, he was—he didn't make—he didn't move around much, he was very limited in his motions. And what I understood in the records was they were attributing that to his retardation. I believe that was attributable to his fear. He didn't—he was very vigilant and he was always

watching. He wasn't going to do anything until he assessed the [12] situation and found a way to deal with it. That's not uncommon in a child that's not safe and neglected.

Q. Ms. Wright, let me ask you if—you know, you weren't there when Bobby Moore was growing up, you didn't observe these things for yourself.

A. No.

Q. Are you kind of dependent on what he tells you? I mean he tells you a story. How do you deal with that when trying to make an evaluation?

A. How do I deal with?

Q. What do you know what really happened? How do you know if it's true, for example, whether he's just trying to sell you a line, you know, he wants you to say something good about him?

A. That's a pretty subjective process. I have to base that on my experience of having worked with hundreds up until, you know, over a thousand people to be able to determine whether what I'm hearing is truth and I have to base that on how they describe what they described.

Q. Do the records help you at all to kind of give an answer to that?

A. Of course.

Q. The records gave me a benchmark to validate what he said and his demeanor ties in with the [13] description of him in his school years.

A. It makes a lot of sense to me.

Q. Okay.

Was there any sign or discussion about drug use and how that might have played apart in his development?

A. I discussed with him his drug use and I feel like he gave me an accurate description. His exposure to drugs began in about the fifth grade. And the purpose for which I think he used drugs was to escape the pain. Those were his words. He said it was one way to escape the pain. He began with marijuana use, which is not uncommon in those younger years. Seeing that passed around he used—can I refer—

Q. Sure.

A. —to my note?

In what would be considered his junior high and high school years he used marijuana, alcohol amphetamines, tranquilizers. And as I said, his quota was that was a way to escape the pain. I think he just used whatever drugs were available to him.

Q. Was that something that's unusual in your experience dealing with people that come from homes of this type?

A. Absolutely not. A child will seek anything [14] that will alleviate the pain that they are in and the terror.

Q. In talking about his—you used the word psychosocial, I think, development. What does that mean?

A. Well, psychosocial development is a very—again, a very common psychological term that—theory that talks about the process that we go through growing up, the developmental task, as they are called, that a child needs to complete in order to move on to the next stage.

Q. What are some of those stages that people go through?

A. Well, they're described in terms of the task that is accomplished or not accomplished, and the earliest one is called trust versus mistrust.

Q. So you tie this to a particular age of development?

A. Yes. According to the theory, there's a general age. Birth to age two a child develops either trust or mistrust. Age two to four a child develops either shame or autonomy. Age four to six, guilt or initiative. Age six to 12, inferiority or industry. Age 12 to 18, which represents young adolescence, alienation or identity. And age 18 to 22 identity [15] confusion over individual identity. And the stages go on all the way through life, but these are the ones I addressed in the terms of Bobby because it was during that last phase that he went to prison.

Q. See you found someone who had obviously difficulties in each of these areas. So does that mean that they're not responsible for what they do; is that what you're telling me?

A. No, of course not. That's not the point. But he is—suffers from a deficit in social development, psychosocial development.

My experience with Bobby was unusual and the story I got from Bobby was unusual because it is my opinion that he did not accomplish any of those tasks in his childhood, and that's very unusual. It's very common for all of us to have not completed one or two or several of these. The less functional I find a person to be in their adulthood the more likely it is that they struggled with these tasks.

Q. What do they do, though, when you get to adulthood and you haven't resolved some of these issues or developed a skill in doing the tasks; what happens to you then?

A. It is possible to go back and relearn. It's always possible.

[16] Q. What's the key component in that ability to do all these other things?

A. I'm sorry.

Q. The key component. What do you have to have before you can do any of these other—development psychologically. What are the things you told us children seek out first?

A. Safety.

Q. Now, you know Mr. Moore has been convicted of criminal offenses and you've seen some of those starting very young. Can you tell us about that?

A. Well, my understanding of the situation, he was thrown out of his home by his father at the age of 15 after an event in which he was trying to prevent his father from hitting his mother. He intervened in a fight where his mother was being abused and told his father not to hit his mother, and his father turned on him and threw him out of the house. He was 15, was not going to school, and he went to stay with a friend and the father contacted the mother of this friend and told the mother that Bobby was no good and that he was dangerous to have in her home so she threw him out.

Q. Where did he go at that point?

A. He spent some time sleeping on the street, I understand.

[17] MS. PARSONS: Your Honor, I object to all the hearsay unless she can identify where—what are we talking about.

MR. MORROW: I'd be happy to clarify that, Your Honor.

Q. (BY MR. MORROW) Ms. Wright, now, he is out on the street and put out of another house. What happens from your study at that point, roughly?

A. What happened to him? What is his story?

MS. PARSONS: Well, Judge, I again object to the hearsay.

MR. MORROW: Judge, she's an expert testifying about his development and allowed to rely on that information to give the jury the basis for opinion.

MS. PARSONS: What information are we talking about, Judge? Now she's talking about what a father said to a neighbor who was—I mean, there is no source of this information, Judge.

MR. MORROW: I'll be happy to clarify that, Your Honor.

Q. (BY MR. MORROW) Ms. Wright, your testimony here today is based on what, interview, review of records; is that right?

A. A review of records and my interview with [18] Bobby Moore.

Q. Okay.

Now, without telling us what somebody else said, what happened next in his developmental process?

A. You were asking about the criminal behavior.

Q. Yes. What happened? How did that come about, in your opinion?

A. In my opinion, he got involved in criminal behavior with his friends and my belief is that that is based on the fact that that was the only social network that he had. That was basically his family and his desire to participate with that social network, to be involved with someone, to have a sense of belonging somewhere.

Q. So does that excuse his conduct, then, that he went out and committed a crime because he felt it was the only family that he had? Does that make it okay?

A. No, it doesn't make it okay. I—from a child's perspective, it's important to realize that a child does not think like an adult. Even at 15, 16, 17, we do not have—an adolescent does not have the complex thinking skills that an adult has. He certainly made poor choices. I don't argue that, and I don't argue the crimes that took place.

[19] Q. And he still bears responsibility for those choices, doesn't he?

A. Yes, sir, he does.

Q. You're not telling us that he is insane or incompetent?

A. No, I am not. I don't think he is either.

Q. Now, this is a—I wonder if this is an unusual situation for you, to talk to somebody who has been in prison for 20 calender years?

A. Yes. I haven't done that often.

Q. Tell me what you learned about that? What did that incarceration mean to him? What did he learn?

A. Most significantly what he learned during his incarceration was how to read and write. And my—the way he explained it to me, his fellow member of death row started giving him some words and teaching him some words and what they meant and—

Q. Did you find that to be significant in your review of the facts and your opinion of him?

A. That relates to what I said a moment ago about we can always go back and learn. And that's what he did. He learned to read and write and from the ability to read and write he gained a lot of information.

Q. Who was the—how did he learn other than from the other prisoners? Were there other people [20] involved as far you know at this point?

A. In the beginning he had—he said that he had a dictionary and a Bible and he looked up words and found letters and began to find those, the significance of those words, and he had a lot of time on his hands and he could repeat those words to himself and memorize what they meant and begin to develop a vocabulary.

Q. Were there other relationships that you're aware of that also helped him through this process, learning to read and write? Was there a person that wrote him letters, people that he corresponded with?

A. He learned how to—he started putting together words so that he could write letters. And he had other inmates that helped him learn particular words and who wrote letters for him and would read the letters he received to him. And he very slowly and progressively began to learn to read, and that opened up a whole world to him.

Q. How do you mean it opened up a whole world to him?

A. He began to understand things that he had no concept of before, which was part of the problem with the educational process. As people learn it's not just words, it's understanding the world and how it functions. And he began to read books, he began to [21] interact with people.

Q. Do you have any particular illustration that you found significant, that were helpful to him?

A. Around 1990—yeah, 1990, he began to correspond with someone through an organization called Lifeline I believe it was. Yes.

Q. Why was that significant?

A. He described he began corresponding with a woman, an older woman who has since died. And his words were I learn the importance of being open and honest, she really added to my growth and development. Which I thought were interesting words for him to choose. He began to see himself as human and participate in relationships with other people.

* * *

[25] Q. Well, would it surprise you that the actual Wechsler intelligence scales for children put his verbal IQ at 77, his performance scale IQ at 83 and his full scale at 78?

A. No, it wouldn't surprise me.

Q. That is not mentally retarded?

A. Yes, ma'am. I agree.

Q. All right.

A. I do not believe that he is mentally retarded myself. He was—what I said was the schools diagnosed him as mentally retarded and he got put aside and kept out of the regular mainstream of the learning process. I do not believe that he is mentally retarded. I believe it is his lack of education. And when he was tested later in the criminal justice system it was—it came out higher.

Q. That's right, it came out higher?

A. Yes, ma'am.

Q. He's not—I mean, from those test scores and educational records and later on when he's tested later in his life he is nowhere near mentally retarded.

A. I agree.

Q. Okay.

A. I agree with that completely. I do not see him as mentally retarded. My point was that he was [26] pushed aside and seen as mentally retarded as a child.

Q. All right. That's the opinion that you have gathered; isn't that right? But nowhere in the school records does it reflect that he was diagnosed as being mentally retarded, does it?

A. I can't find that, no.

* * *

[42] Q. Ms. Wright, you weren't trying to tell the jury that it's your opinion that Mr. Moore is retarded, are you?

A. No, sir.

Q. And in fact, what is your opinion about his ability to learn on his level of functioning?

[43] A. I think he probably has an average IQ and his ability to learn is very intact.

* * *

JUL 23 2015
OFFICE OF THE CLERK

No. 15-797

IN THE
Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF FOR PETITIONER

Alex Blaszczuk
Peter Horn
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Luke Varley
601 Lexington Avenue
New York, NY 10022

Clifford M. Sloan
Counsel of Record
Lauryn K. Fraas
Donald P. Salzman
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

TABLE OF CONTENTS

QUESTION PRESENTED i

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 3

A. Bobby James Moore's Childhood and Adolescence 4

B. Moore's Conviction and Death Sentence 7

C. Habeas Proceedings Prior to the *Atkins* Hearing 7

D. The *Atkins* Hearing 10

E. The State Habeas Court's *Atkins* Decision 14

F. The CCA's *Atkins* Decision 17

SUMMARY OF ARGUMENT 24

ARGUMENT 27

I. *ATKINS* AND *HALL* MAKE CLEAR THAT PROHIBITING THE USE OF CURRENT MEDICAL STANDARDS IN INTELLECTUAL DISABILITY DETERMINATIONS IN CAPITAL PROCEEDINGS VIOLATES THE EIGHTH AMENDMENT 27

II. THE CCA'S REJECTION OF CURRENT MEDICAL STANDARDS VIOLATES THE EIGHTH AMENDMENT 31

A. The CCA's Rejection Of Current Medical Standards Conflicts With The Medical Community's Diagnostic Framework 32

B. The CCA's Approach Rejects Current Medical Standards Because It Relies On Non-Clinical Factors That Conflict With Medical Consensus 49

CONCLUSION 60

TABLE OF AUTHORITIES

CASES

Page(s)

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Bobby v. Bies,
556 U.S. 825 (2009) 9

Brumfield v. Cain,
135 S. Ct. 2269 (2015) 9, 37, 38

Butler v. Stephens,
625 F. App'x 641 (5th Cir. 2015) 56

Chase v. State,
171 So. 3d 463 (Miss. 2015) 48

Commonwealth v. Williams,
61 A.3d 979 (Pa. 2013) 55

Commonwealth v. Bracey,
117 A.3d 270 ..... 48, 55

Ex parte Briseno,
135 S.W.3d 1 (Tex. Crim.
App. 2004) ..... *passim*

Ex parte Cathey,
451 S.W.3d 1 (Tex. Crim. App. 2014) 50

Ex parte Hearn,
310 S.W.3d 424 (Tex. Crim. App. 2010) 46

Ex parte Sosa,
364 S.W.3d 889 (Tex. Crim. App. 2012) ..... *passim*

Ex parte Van Alstyne,
239 S.W.3d 815 (Tex. Crim. App. 2007) 50

Hall v. Florida,
134 S. Ct. 1986 (2014) ..... *passim*

Howell v. State,
No. W2009-02426-CCA-R3-PD, 2011 WL 2420378 (Tenn. Crim. App. June 14, 2011) 55

Lindh v. Murphy,
521 U.S. 320 (1997) 9

Moore v. Collins, No. 4:93-cv-03217, Dkt. No. 13, Mem. Op. (S.D. Tex. Sept. 29, 1995) 8

Moore v. Johnson,
194 F.3d 586 (5th Cir. 1999) ..... *passim*

Moore v. Johnson,
521 U.S. 1115 (1997) 9

Moore v. State,
700 S.W.2d 193 (Tex. Crim. App. 1985) 7

Moore v. State,
No. 74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) 10

Oats v. State,
181 So.3d 457 (Fla. 2015) 48

Roper v. Simmons,
543 U.S. 551 (2005) 57

State v. Agee,
364 P.3d 971 (Or. 2015) 48

STATUTES

28 U.S.C. § 1257(a) 3

Tex. Health & Safety Code § 590.003(13) 18

Tex. Penal Code Ann. § 12.31 (West 2015) 10

U.S. Const. amend. VIII 3

U.S. Const. amend. XIV 3

REGULATIONS

37 Tex. Admin. Code § 380.8779(e)(2)(B) 47

OTHER AUTHORITIES

American Association on Intellectual and Developmental Disabilities, *User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* (2012) ..... *passim*

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ..... *passim*

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) 33

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 18, 30

American Bar Association, *The Texas Capital Punishment Assessment Report* (Sept. 2013) 52

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ..... *passim*

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000) 30

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1992) 13

American Psychiatric Association, *DSM-5 Intellectual Disability Fact Sheet, https://www.psychiatry.org/psychiatrists/practice/dsm/dsm-5* 35

Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721 (2008) 52

Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill Rts. J. 467 (2014) 58

Gilbert S. Macvaugh III & Mark D. Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131 (2009) 38, 54, 58

John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. 393 (2014) 53

John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 689 (2009) 52, 54

INTRODUCTION

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court recognized a fundamental constitutional principle: the Eighth Amendment bars the execution of an individual who is intellectually disabled. The Court explained that a State's legal determination must be "informed by the medical community's diagnostic framework," and that a state's determination may not "go[] against the unanimous professional consensus" or "disregard[] established medical practice." *Hall*, 134 S. Ct. at 1995, 2000. In conflict with this Court's decisions, and the Eighth Amendment, the Texas Court of Criminal Appeals ("CCA") has prohibited consideration of current medical standards when evaluating the constitutionality of executing an individual who claims intellectual disability.

In this case, the state habeas trial court—applying current medical standards—determined that Petitioner Bobby James Moore is intellectually disabled and thus ineligible for the death penalty. The CCA rejected that determination and held that the trial court erred in "us[ing] the most current position . . . regarding the diagnosis of intellectual disability." App. 6a. The CCA explained that, rather than current medical standards, Texas courts must use a 1992 definition of intellectual disability that the CCA invoked in the wake of *Atkins*, along with seven non-clinical "evidentiary factors" that the CCA derived from lay stereotypes of the intellectually disabled and the fictional character Lennie in John Steinbeck's *Of Mice and Men*. The CCA crafted these non-clinical factors pursuant to its view that not all who are diagnosed as intellectually disabled for "clin-

ical purposes" are entitled to protection from execution under *Atkins*. *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012); *Ex parte Briseno*, 135 S.W.3d 1, 6-9 (Tex. Crim. App. 2004). The CCA held that Moore is not intellectually disabled under its approach, and that Moore's execution should proceed.

The CCA's determination that Texas courts must not consider current medical standards—and must instead use its *Briseno* framework of superseded medical standards and non-clinical factors—runs headlong into this Court's decisions. Texas's approach defies both the Constitution and common sense. It is a conspicuous outlier among state and federal courts considering intellectual disability, and squarely presents the deeply troubling prospect that intellectually disabled individuals—like Moore—will be executed in violation of their Eighth Amendment rights.

Accordingly, the CCA's decision should be reversed.

OPINIONS BELOW

The CCA's opinion is reported at 470 S.W.3d 481 (Tex. Crim. App. 2015) and reprinted in the Appendix to the Petition for Certiorari ("App.") at App. 1a–126a. The state habeas trial court's findings of fact and conclusions of law are unreported. *See* App. 127a–203a (intellectual disability claim), 204a–287a (other claims).

STATEMENT OF JURISDICTION

The CCA issued its judgment on September 16, 2015. The petition for a writ of certiorari was filed on December 15, 2015 and granted with respect to Ques-

tion 1 on June 6, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Bobby James Moore was born in 1959. Throughout his childhood, he had grave difficulties with academic, social and conceptual issues. At the age of twenty, in 1980, he was involved in a bungled robbery with two other individuals in which an employee was shot and killed. He was convicted as the shooter and sentenced to death.

His subsequent state and federal habeas proceedings included a resentencing proceeding as the result of ineffective assistance of counsel at his initial sentencing proceeding. The resentencing again resulted in a death sentence. After a two-day *Atkins* hearing in January 2014, the state habeas trial court determined that Moore is intellectually disabled. In September 2015, the CCA rejected that determination.

A. Bobby James Moore's Childhood and Adolescence

Moore had profound mental and social difficulties as a youth. Even as a thirteen-year-old, Moore lacked basic understanding of the days of the week, the months of the year, the seasons, telling time, the standards of measure, and the principle that subtraction is the reverse of addition. App. 187a, ¶153. Teachers, peers, and Moore's own father called Moore "stupid" for being slow to read and speak, and his teachers separated him from the rest of the class, often instructing him to draw pictures because he was unable to keep up with basic schoolwork. App. 146a, ¶54; 181a–182a, ¶ 141; 182a–183a, ¶142. Moore was consistently described as "withdrawn" by his teachers, and he took no part in his classes unless called upon. App. 190a–191a, ¶¶161–162.

Moore's time in school—from his earliest years—was marked by a pattern of failure to grasp basic academic skills. Moore failed first grade twice, but school officials let him advance to second grade—not because of any showing of academic improvement, but simply to "keep him with children of a similar age." App. 184a, ¶¶145–146. His subsequent school years repeated this routine: Moore displayed a wholesale lack of comprehension of fundamental skills possessed by his peers and received failing grades, but school officials nevertheless promoted him so that he would not be markedly older than his classmates. *See* App. 184a–188a, ¶¶147–49, 151, 155–57 Finally, Moore dropped out of school after failing every subject in ninth grade. App. 188a, ¶157.

Not only did Moore experience grave struggles with his intellectual development and abject failure

in school, he also suffered a debilitating head injury during Texas's schoolhouse integration battles. Moore, as a fifth grader, was part of an *African American* group of students newly assigned to Scroggins Elementary, a predominantly Hispanic school. App. 136a–137a, ¶30. In a violent episode in December 1971, when he was twelve, Moore tried to board his school bus while hostile throngs confronted the children and set their bus on fire by lobbing Molotov cocktails inside. 2 RR 39–40.[1] Moore was hit in the head with a chain and a brick as he tried to make his way to the bus. *Id.* at 39–41, 62, 64. Four of his classmates pulled him onto the bus and away from the chaos outside, but Moore's face was "gashed wide open" and his entire head was swollen from the attack. *Id.* at 39–40, 64; *see also* App. 136a, ¶30 ("he got hit with a chain across his head, in his eye, it was bleeding, his mouth was busted") (internal quotation marks omitted). According to the state habeas trial court, it is "highly possible" that Moore suffered a "traumatic brain injury" in this school bus fracas. *Id.*; *see also* App. 137a, ¶31 (noting additional likely causes of a traumatic brain injury).

Moore was not able to seek refuge at home from the criticisms of teachers and classmates about his diminished intellectual abilities. While Moore's father was generally very abusive to his children and wife, he was particularly "displeased" with Moore because of his abysmal performance at school and because Moore "didn't talk much." 2 RR 34; *see also*

---

[1] All record citations designated "RR" are to the Reporter's Record for the state habeas proceedings. All record citations designated "CR" are to the Clerk's Record for the state habeas proceedings.

App. 141a, ¶39; 181a–182a, ¶ 141. Moore's father routinely beat him for exhibiting slow intellectual development. For instance, Moore's father tried to teach him to spell the word "cat." 2 RR 61–62. When Moore failed to properly spell the word, his father would bend Moore's fingers back as far as possible and whip him with his hand. *Id.* at 61–62, 67–68. His father also would beat Moore when he performed poorly on school assignments, *see id.* at 33, or if he failed to understand what his father was saying and did not know how to respond, *see* App. 181a–182a, ¶ 141. Moore's sister, in an effort to protect Moore from their father's rage about Moore's mental shortcomings, would guide Moore's hand in school so that he wrote and spelled words properly. 2 RR 33. Moore's father's anger would erupt when school officials visited the home and told him that Moore needed additional assistance. *Id.* at 34.

When Moore was fourteen, his father's anger boiled over about Moore's mental deficiencies. His father became irate when he realized that Moore still did not know how to read. *Id.* at 43. His father "called [Moore] dumb and he was whipping him," but Moore did not cry and "just stood there while [his father] beat him." *Id.* Moore's father then ordered him to leave the house and never return "because he wasn't no son of his because he was dumb." *Id.*[2]

---

[2] The record also contains testimony that Moore's expulsion from home was precipitated by his attempt to protect his mother from his father's abuse, and that his father singled him out for especially harsh treatment because of his protective efforts. App. 140a-141a, ¶37.

B. Moore's Conviction and Death Sentence

On May 13, 1980, the State charged Moore with capital murder stemming from a bungled robbery and shooting at a Houston market in April 1980, when Moore was twenty. App. 128a, ¶¶ 1–2; *Moore v. Johnson*, 194 F.3d 586, 593 (5th Cir. 1999). Moore and two others attempted to rob the market. *Moore*, 194 F.3d at 593. During the course of the botched robbery, Moore's gun discharged and killed one of the store clerks. *Id.* Moore insisted that the shooting was accidental (although his initial defense also included a claimed alibi defense). *See id.* at 618.

On July 15, 1980, Moore was convicted of capital murder and sentenced to death. App. 128a, ¶2. The CCA affirmed. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113 (1986).

C. Habeas Proceedings Prior to the *Atkins* Hearing

After initial state and federal habeas proceedings, Moore filed his second state habeas petition in April 1992. On April 23, 1993, the state habeas court conducted an evidentiary hearing on his ineffective-assistance-of-counsel claims, including the claim that trial counsel failed to investigate, develop, or present evidence of Moore's impaired mental functioning as a mitigating factor. The court denied Moore's petition, and the CCA affirmed. Moore then raised those claims in his second federal habeas petition. *Moore*, 194 F.3d at 601-02, 613.

The federal district court held that Moore's trial counsel performed deficiently at both the guilt and punishment phases. *See Moore v. Collins*, No. 4:93-

cv-03217, Dkt. No. 13, Mem. Op. at 31 (S.D. Tex. Sept. 29, 1995) ("[t]rial counsel grossly mishandled the representation of Moore and violated their oath as members of the bar with astonishing frequency"; "[t]he egregiousness of their conduct not only jeopardized the rights of [Moore], but denigrated the legal system as a whole, the aggregate effect of which resulted in a sure death sentence"). The court ruled that Moore had established prejudice regarding the punishment phase and remanded for a new punishment hearing. *Id.*

The Fifth Circuit affirmed, holding, among other things, that the failure of trial counsel to investigate, develop, or present mitigating evidence constituted ineffective assistance in the punishment phase. *Moore*, 194 F.3d at 593. The court discussed, inter alia, Moore's school records, explaining that they "describe a morose and withdrawn child who rarely participated in classroom activities," who "never passed any year and was granted only social promotions," and who "suffer[ed] from severe developmental delays, perhaps resulting from poor nutrition and inadequate parenting." *Id.* at 613. The court also highlighted the "substantial evidence of impaired mental development and functioning" that Moore had produced, including "some evidence of organic brain damage resulting from severe trauma." *Id.* The court held that the state should be permitted to remedy the constitutional error by imposing a sentence less than death or by conducting a new punishment proceeding. *Id* at 593.[3]

---

[3] The Fifth Circuit so ruled after this Court granted Moore's prior certiorari petition, vacated the Fifth Circuit's initial decision, and remanded for further consideration in light of *Lindh v.*

The State conducted a new punishment hearing. App. 128a–129a, ¶¶6–8. On February 14, 2001, the jury answered two special issues in the affirmative and the mitigation special issue in the negative. App. 129a, ¶8. The state trial court again sentenced Moore to death. *Id.* at 129a, ¶9.[4]

On January 14, 2004, the CCA affirmed. *Moore v. State*, No. 74,059, 2004 WL 231323 (Tex. Crim. App.), *cert. denied*, 543 U.S. 931 (2004).

Murphy, 521 U.S. 320 (1997). *See Moore v. Johnson*, 521 U.S. 1115 (1997).

[4] During this new punishment hearing—which was held prior to *Atkins*—Moore's counsel did not argue that Moore was intellectually disabled. Instead, his counsel urged that Moore was "'capable of learning'" and that prison had afforded him the opportunity to "'learn and grow and become the kind of person that he could have become had he come from a safe environment.'" App. 42a-43a. The counsel's decision must be viewed in context. As this Court recognized in *Atkins*: "As *Penry* demonstrated, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321; *see also, e.g., Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (at "pre-*Atkins* trial," Brumfield had "little reason to present evidence relating to intellectual disability"; if he had "done so at the penalty phase, he ran the risk that it would 'enhance the likelihood future dangerousness [would] be found by the jury" (citation omitted)); *Bobby v. Bies*, 556 U.S. 825, 836-37 (2009) (distinguishing intellectual disability as a mitigator from intellectual disability under *Atkins*, and recognizing that *Atkins* changed parties' interests with respect to intellectual disability determinations). The issue was further compounded in Moore's case because, at the time of Moore's resentencing, Texas juries did not have the option of recommending a sentence of life without parole in capital cases. 2005 Tex. Sess. Law Serv. Ch. 787 (S.B. 60) (West) (effective Sept. 1, 2005), *codified at* Tex. Penal Code Ann. § 12.31 (West 2015).

D. The *Atkins* Hearing

On June 17, 2003, Moore filed a state habeas petition. It included a claim that the Eighth Amendment and this Court's decision in *Atkins* barred his execution on the ground that he is intellectually disabled. CR00048–00061. On January 2 and 3, 2014, the state habeas trial court held an evidentiary hearing on Moore's *Atkins* claim. App. 129a, ¶13.

Moore's submission at the *Atkins* hearing included seven witnesses—two family members and a childhood friend who testified about Moore's intellectual deficiencies in his youth; a former inmate; and three mental health experts. The State's submission included two witnesses—a prison official and a mental health expert.

Moore presented the testimony and reports of two experts who diagnosed him with an intellectual disability. Robert Borda, a clinical neuropsychologist, determined that Moore has "a significant Intellectual and Developmental Deficiency, and by any current standards should be considered to have functioned within the Mentally Deficient (or Mentally Retarded) range for all of his teen and adult life." JA17 (emphasis removed); *see also* JA39 (confirming that Moore "meets the criteria for a diagnosis" of intellectual disability). Borda testified about Moore's intellectual deficiencies and adaptive problems. He emphasized the conspicuous deficit that Moore displayed on a test to assess Moore's "executive functioning": "He had a score of 1, which is the lowest score I've ever recorded and I've done a lot of testing of brain injury people." JA35, JA16–17. Borda also found that Moore "clearly had marked deficits in adaptive functioning," noting, among other things,

Moore's inability to learn from past experiences, communication deficits and follower behavior. JA11–12.[5]

Shawanda Williams-Anderson, a neuropsychologist, likewise determined that Moore "met full criteria for a diagnosis of mental retardation as a child." JA73; *see also* JA89 (confirming that Moore "meet[s] the criteria for mental retardation"). As part of her clinical evaluation, Williams-Anderson administered a battery of ten assessment tools to Moore and interviewed him and his family. JA58–59, JA73. She concluded that Moore has deficits in executive functioning, slowed processing speed, difficulty with reasoning and judgment, and deficits in verbal ability. JA80, 82–85; JA74. She also found deficits in the adaptive domains of socialization, communication and cognition. JA73. Noting reports of multiple head injuries, she stressed that "Bobby's severity and characterization of deficits was complicated by head trauma. That is, specific to his case is an impover-

---

[5] Borda previously had testified about Moore's intellectual disability in a 1993 hearing on Moore's ineffective assistance of counsel claim. During that hearing, Borda testified—based on his limited review of certain school records and psychological testing—that Moore's intelligence was in the "borderline retarded range." *Moore*, 194 F.3d at 613; JA7–8. In affirmatively diagnosing Moore as intellectually disabled at the 2014 hearing, he explained that he now viewed Moore as "having a significant Intellectual and Development Deficiency," because, inter alia, he had reviewed "extensive additional records" and "extensive additional test findings and testimony from family members"; he had personally evaluated Moore; and "the definition of 'mental retardation' or intellectual disability (ID) has changed to some extent." JA7–8, JA17.

ished brain that was even more compromised by multiple insults." JA74.[6]

Moore also presented the testimony of Stephen Greenspan, a retired professor of educational psychology with an expertise in intellectual disability, regarding general standards for intellectual disability. Greenspan noted that, while he had reviewed records regarding Moore's condition, he had not met him or diagnosed him. JA120.

Moore's experts emphasized that medical standards on intellectual disability have changed over time, and that current standards should be considered and applied. Borda, for instance, testified that the standards have "changed over the years," JA21, and that compared to earlier editions, "[t]he DSM-V puts much more heavy emphasis on practical abilities, everyday life." JA27.[7] He further explained that "the [DSM-]IV is more heavily weighted towards test scores and the ability to function independently and [DSM-]V is getting away from the test scores and looking at adaptive functioning." JA28.[8]

Similarly, Greenspan testified that clinical definitions of intellectual disability have evolved over the years and moved away from the use of rigid reliance on IQ scores. *See, e.g.*, JA114. He also testified

---

[6] The record also contained two expert reports filed with the motion for an *Atkins* hearing which supported a finding of intellectual disability. *See* JA229–255.

[7] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (hereinafter, "DSM-5" or "DSM-V").

[8] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1992) (hereinafter, "DSM-IV").

about the "persistence of stereotypes" of what intellectually disabled persons can and cannot do and the difficulties those stereotypes can present for diagnosing intellectual disability. JA116-117.

The State introduced the testimony of Kristi Compton, a clinical and forensic psychologist. She testified that she administered a Wechsler Adult Intelligence Scale—Fourth Edition ("WAIS-IV") IQ test to Moore, and that Moore scored a 59. App. 53a. She acknowledged that this result was consistent with a diagnosis of intellectual disability. JA187. Compton testified, however, she "was surprised by that result" and "thought it would be higher." JA154. She expressed her view that Moore had given "some suboptimal performance" on the test; she variously testified that she "expected him to fall somewhere within the 70s," in the "upper 60s, upper 70s if you took the mean," and "somewhere between the upper 60s and the 70s." JA154, JA203, JA204. Compton similarly administered a test to measure adaptive functions – the Texas Functional Living Scales – and found that Moore's performance was "2.5 standard deviations below the mean." JA200–201. While acknowledging that Moore was unable to do simple tasks such as "draw the hands of [a] clock correctly," JA201-202, she again expressed doubt about the result, this time because of Moore's limited life experiences. JA156. Compton opined that, although "there is a greater probability than not that Mr. Moore suffers from borderline intellectual functioning," she "d[id] not have the data to support a diagnosis of mental retardation . . . because [Moore's] adaptive functioning . has been too great." JA185. She concluded, "I believe that I don't have enough information on his adaptive deficits or adaptive – I do

not believe there's enough adaptive deficits to diagnose him with mental retardation. I do think he has below average intelligence but I do not believe there's enough in the record or from what I've seen to qualify for that diagnosis." JA186. Regarding adaptive deficits, in addition to her own test results that put him 2.5 standard deviations below the mean, she pointed to information she had received about Moore's behavior in prison, his ability to survive on the streets after he was thrown out at age 14, his ability to play pool and mow neighbors' grass for money, the circumstances of his crime, and other matters. JA146–148. On cross-examination, she testified that, if some of her "assumptions" about Moore's "adaptive deficits and adaptive skills" were changed, it "may" affect her conclusion. JA215.

E. The State Habeas Court's *Atkins* Decision

The state habeas trial court concluded that Moore was intellectually disabled and that the Eighth Amendment barred his execution. The court determined that Moore's petition should be granted on his *Atkins* claim.

The court began by noting that, "[i]n determining whether Mr. Moore has mental retardation, the Court has been guided by the clinical definitions of mental retardation developed by the American Association on Intellectual and Developmental Disabilities ('AAIDD') and the American Psychiatric Association ('APA')." App. 147a, ¶58. It then explained that the "standards of psychological diagnosis" "evolve" over time. App. 150a, ¶66. Thus, it "dutifully relied on the [AAIDD 2010 Manual's] definition of mental retardation to determine wheth-

er Mr. Moore has mental retardation." App. 163a, ¶97; *see generally* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) (hereinafter, "AAIDD 2010 Manual").

The state habeas trial court first analyzed Moore's numerous risk factors for intellectual disability, App. 129a–147a (relying on AAIDD 2010 Manual, 58–62), including, traumatic brain injury (App. 136a, ¶¶ 30–31), malnutrition (App. 137a-138a, ¶¶32–33), family poverty (App. 141a, ¶38), child abuse and neglect (App. 141a, ¶ 39) and inadequate special education services (App. 145a–146a, ¶¶51–56).

The court then analyzed the three prongs of the definition of intellectual disability: (1) intellectual functioning; (2) adaptive behavior; and (3) onset during the developmental period.

(1) *Intellectual functioning.* Turning first to the intellectual-functioning prong, the court determined that "Moore's IQ scores establish that he has 'significant limitations' in intellectual functioning or 'significantly subaverage' general intellectual functioning." App. 167a, ¶103. The court identified scores on seven IQ tests that Moore had completed between 1971 and 1989:

- 77 on the Otis-Lennon Mental Abilities Test in 1971, App. 167a, ¶105;
- 57 on the Slosson Intelligence Test for Children in 1972, App. 167a, ¶106;
- 78 on the Wechsler Intelligence Scale for Children ("WISC") in 1973, App. 167a–168a, ¶107;
- 67 on the Bender Visual Motor Gestalt Test in 1973, App. 168a, ¶108;

- 72 on the Goodenough Draw-A-Man Test in 1973, App. 168a, ¶109;
- 71 on a test taken as part of a psychological evaluation at prison in 1984, App. 168a, ¶110; and
- 74 on the Wechsler Adult Intelligence Scale—Revised ("WAIS-R") in 1989, App. 168a–169a, ¶111.[9]

The court calculated that the average IQ score from Moore's IQ tests was 70.66. App. 170a, ¶116. It held that Moore's "mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the [AAIDD]." App. 201a, ¶180.[10]

(2) *Adaptive behavior.* The court next analyzed the adaptive behavior prong. Applying the definition from the AAIDD 2010 Manual, which "requires 'performance that is approximately two standard deviations below the mean'" in any one of three areas of adaptive behavior, the court found that Moore's "adaptive behavior in at least one of the skill-sets is approximately two standard deviations below the mean." App. 200a, ¶¶176–77. The court further credited the testimony of Moore's "highly qualified expert witnesses . . . that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him

---

[9] The habeas trial court noted that Moore's 1989 WAIS-R test contained a calculation error, with an incorrect score of 74 rather than 73. App. 169a, ¶112; *see also* App. 63a-64a n.38 (CCA's holding that error should not be corrected).

[10] This mean IQ score does not include the 59 that Moore received on the WAIS-IV administered by Compton in December 2013, App. 170a ¶115, or the 71 on the abbreviated WAIS-R administered by the prison in 1984. App. 168a, ¶110.

approximately two standard deviations below the mean in adaptive functioning." App. 201a, ¶181.[11]

(3) *Onset during the developmental period.* Finally, the state habeas trial court found the third prong satisfied because "[t]here is ample evidence that Mr. Moore suffered from significant deficits in adaptive functioning . . . before the age of 18." App. 201a, ¶178.

Turning to the ultimate question of whether Moore is intellectually disabled, the court agreed with Moore's experts "that Mr. Moore meets the diagnostic criteria for mental retardation intellectual functioning." App. 201a–202a, ¶182. The court held that Moore "has established that he meets the definition of mental retardation under the current guidelines of the AAIDD, under both the DSM-IV and DSM-V, and under the prevailing legal standards per [*Atkins*]." App. 202a, ¶183. The court determined that relief should be granted on Moore's *Atkins* claim.

F. The CCA's *Atkins* Decision

The CCA rejected the state habeas trial court's decision. It held that the trial court "erred by . . employing the definition of intellectual disability presently used by the AAIDD." App. 6a. The CCA

---

[11] The court rejected the state's argument that Moore's behavior in prison undermined his showing of significant deficits in adaptive functioning. It explained that "[t]he very fact that he has adapted to life inside a prison so well, is almost certainly due to its highly regimented routine, which leaves little room for independent decision-making." App. 193a–194a, ¶167. It further observed that "these records [of behavior in prison] are not appropriate tools by which to exclude intellectual disability in capital murder cases." App. 194a, ¶168.

stated that this Court in *Atkins* "determined that the execution of intellectually disabled individuals violates the Eighth Amendment, but left it to the States to develop appropriate ways to enforce the constitutional restriction." App. 5a. The CCA then noted that, in its 2004 *Briseno* decision, it had "adopted the definition of intellectual disability stated in the ninth edition of the [American Association on Mental Retardation ("AAMR")] manual, published in 1992." App. 5a;[12] *see generally* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) (hereinafter, "AAMR 1992 Manual").[13] The CCA acknowledged the trial court's recognition that "the AAMR's and APA's conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided." App. 5a. However, in light of what it viewed as "the subjectivity surrounding the medical diagnosis of intellectual disability" and the failure of the Texas legislature to adopt a statute, it stated that it will "continue to follow the AAMR's 1992 definition of intellectual disability that [it] adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases," notwithstanding the changes in clinical standards since that time, and that it would also continue to apply

---

[12] In addition to the 1992 AAMR definition, the *Briseno* Court also invoked the definition of mental retardation found in the Texas Health and Safety Code: "'significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.'" *Briseno*, 135 S.W.3d at 6 (quoting Tex. Health & Safety Code § 590.003(13)).

[13] The AAIDD formerly was known as the AAMR. The AAMR 1992 Manual was a predecessor to the AAIDD 2010 Manual used by the state habeas trial court.

additional non-clinical factors that it had fashioned in *Briseno*. App. 5a–7a.[14]

Applying its own standard, which referenced the decades-old medical standard in the AAMR 1992 Manual and incorporated its own non-clinical factors, the CCA concluded that Moore failed to establish he was intellectually disabled.

(1) *Intellectual functioning.* The CCA employed a strict IQ cut-off to determine that Moore's above-70 IQ disqualified him from a diagnosis of intellectual disability. Rejecting reliance on five of seven IQ tests that Moore completed between 1971 and 1989, the CCA selected two of Moore's three highest IQ scores: his 78 on the WISC in 1973, and his 74 on the WAIS-R in 1989. App. 73a. Although the CCA initially acknowledged the standard error of measurement, App. 8a, it then discounted the low-end of the range associated with his 74 IQ score because of Moore's "history of academic failure" and because he took the test while "on death row and facing the prospect of execution," App. 74a-75a. Based upon its determination that Moore's IQ scores placed him "above the intellectually disabled range," App. 75a, the CCA held that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning." App. 63a, 74a–75a.

(2) *Adaptive behavior.* The CCA then found that "[e]ven if [Moore] had proven that he suffers from significantly sub-average general intellectual func-

---

[14] In prohibiting the use of current medical standards, the CCA included the statement that "the legal test it established [in 2004] . . . remains adequately 'informed by the medical community's diagnostic framework.'" App. 7a (quoting *Hall*, 134 S. Ct. at 2000).

tioning," he "has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning." App. 75a. The CCA explained that it "'consider[s] *all* of the person's functional abilities,' including 'those that show strength as well as those that show weakness.'" App. 11a. According to the CCA, the trial court erred by "consider[ing] only weaknesses in [Moore's] functional abilities." App. 12a. The CCA cited Compton's testimony regarding Moore's adaptive behavior, including that Moore purportedly showed adaptive skills by, among other things, living in a pool hall after he was thrown out of his house; playing pool and mowing lawns for money; living on the streets; covering up his gun while entering the store during commission of the crime; wearing a wig during the crime; fleeing to Louisiana after commission of the crime; and testifying at trial. App. 80a–81a, 85a–86a. The CCA also emphasized Moore's development of skills while in prison, holding that the trial court erred by not relying on Moore's prison records. App. 12a, 81a–84a.

In addition to rejecting the habeas trial court's findings regarding Moore's intellectual functioning and adaptive behavior, the CCA also held that the trial court erred by purportedly failing to make a "relatedness inquiry" between the two prongs of the intellectual-disability standard. App. 10a. The CCA stated that an individual must prove not only "significantly sub-average general intellectual functioning and significant limitations in adaptive functioning," but also that "his adaptive behavior deficits are related to significantly sub-average general intellectual functioning rather than some other cause." *Id.* The CCA further explained that its additional "*Briseno*

factors" "weigh[] heavily against a finding that [Moore's] adaptive deficits, of whatever nature and degree they may be, are related to significantly subaverage general intellectual functioning." *Id.* at 89a.[15]

Applying its "relatedness" test to Moore's case, the CCA concluded that "the record does not support a finding that," even assuming that Moore had adaptive deficits, "these deficits were linked to

---

[15] In *Briseno*, the CCA crafted its factors after observing that clinical standards are "exceedingly subjective" and invoking the character Lennie from *Of Mice and Men* as the example of an intellectually disabled individual whom "[m]ost Texas citizens might agree should, by virtue of his lack of reasoning ability and adaptive skills, be exempt" from the death penalty. 135 S.W.3d at 6-9. The CCA's seven *Briseno* factors are:

- "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
- "Has the person formulated plans and carried them through or is his conduct impulsive?
- "Does his conduct show leadership or does it show that he is led around by others?
- "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- "Can the person hide facts or lie effectively in his own or others' interests? Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?"

App. 11a (brackets in original).

significantly sub-average general intellectual functioning." App. 88a. "Rather," according to the CCA, "the record overwhelmingly supports the conclusion that [Moore's] academic difficulties were caused by a variety of factors, including trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary schools three times in three years, racially motivated harassment and violence at school, a history of academic failure, drug abuse, and absenteeism." App. 88a–89a. The CCA also stated that "[t]he significant advances [Moore] has demonstrated while confined on death row further support the conclusion that his academic and social difficulties were not related to significantly sub-average general intellectual functioning." App. 89a.

Judge Alcala dissented. She expressed her profound disagreement with the majority's prohibition on using current medical standards, and explained that "[i]n light of both *Atkins* and *Hall*, a court reviewing an intellectual-disability claim is compelled to consult current medical standards in determining whether a particular offender falls within the medical definition of an intellectually disabled person." App. 100a; *see also* App. 98a. Judge Alcala emphasized important differences between the DSM-IV and the DSM-5. *See* App. 111a–112a (discussing multiple sources). She highlighted significant developments in the approach to IQ scores; the evaluation and role of adaptive functioning; the recognition that the ability "to perform basic life functions" may be entirely consistent with intellectual disabilities; and the lack of clinical significance of adaptation in prison and on death row App. 107a, 112a–114a.

The dissent also criticized the majority's use of the non-clinical *Briseno* factors, finding them unsupported by any "authority, medical or legal." App. at 97a–98a. Judge Alcala argued that "the majority opinion's continued application of the *Briseno* standard is constitutionally unacceptable because it relies on an unscientific assessment that (1) considers adaptive deficits based on the DSM-IV alone, (2) includes a comparison to the fictional character Lennie, and (3) considers seven evidentiary factors that are inapplicable in this context." App. 111a. The dissent further criticized the majority for effectively employing an IQ cutoff and for "cherry pick[ing] [Moore's] two higher IQ scores" and "disregard[ing] the other scores." App. 106a–108a.

Judge Alcala explained that she would have held that the CCA "must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and that the reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable." App. 104a. She thus would have "modif[ied] [the CCA's] analysis in *Briseno* so that it conforms to the current consensus of the medical community," including the 2010 AAIDD Manual and the DSM-5. App. 104a–105a. Judge Alcala emphasized, "This Court cannot continue to apply an outdated and erroneous standard." App. 95a n.2.

SUMMARY OF ARGUMENT

This Court's decisions in *Atkins* and *Hall* squarely control this case. As this Court made clear in *Hall*, a state's legal determination of intellectual disability must be "informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. The CCA's decision to prohibit consideration of the medical community's *current* "diagnostic framework" is inconsistent with that fundamental principle.

The CCA has repeatedly expressed skepticism of clinical standards in the *Atkins* context. In its seminal case after *Atkins*, the CCA adopted non-clinical factors for evaluating intellectual disability (and invoked the fictional character Lennie) because of the CCA's view that clinical standards are "exceedingly subjective" and because the CCA questioned whether everyone who qualifies as intellectually disabled under clinical standards is entitled to *Atkins* protection in Texas. *Briseno*, 135 S.W.3d at 5–9. In this case, the CCA has taken its hostility to clinical standards a major step further by flatly prohibiting the use of current medical standards, again based on what it views as "the subjectivity surrounding the medical diagnosis of intellectual disability." App. 6a–7a.

In *Atkins* and *Hall*, this Court established that the Eighth Amendment categorically prohibits the execution of persons with intellectual disability. Citing the impairments set forth in clinical definitions, *Atkins* concluded that defendants with intellectual disability bear diminished personal culpability "by definition." 536 U.S. at 318. In *Hall*, this Court reiterated that "clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. In holding Florida's strict

IQ cut-off unconstitutional in *Hall*, the Court emphasized that a State's legal determination of intellectual disability cannot "disregard[] established medical practice" or "go[] against the unanimous professional consensus." *Id.* at 2000. In both *Atkins* and *Hall*, this Court used the current clinical and medical standards.

The medical community itself relies on the current diagnostic framework precisely because, based on constant study and refinement, it best reflects clinicians' understanding of intellectual disability and its proper diagnosis. Just as there would be no valid medical reason for a clinician to diagnose whether an individual suffers from intellectual disability based on outdated or unscientific standards, there is no valid legal reason for a court to use such a standard in evaluating a claim under *Atkins*. Moreover, if states are permitted to disregard current medical standards, they may under-enforce *Atkins*'s categorical prohibition, with the inevitable and irreversible result that a person who is intellectually disabled according to prevailing clinical standards will be executed in clear violation of *Atkins* and *Hall*.

The CCA's prohibition on the use of current medical standards—and its conflict with current medical standards—violates *Atkins*, *Hall*, and the Eighth Amendment. The CCA erroneously refused to consider current standards on intellectual functioning and adaptive behavior. For intellectual functioning, current standards do not impose a strict numerical cut-off, as this Court recognized in *Hall*. Similarly, for adaptive behavior, current standards emphasize the centrality of adaptive deficits and methods for their assessment. And, for the relationship between intellectual functioning and adaptive behavior, cur-

rent standards belie the distorted inquiry adopted by the CCA, in which concurrent evidence that an individual suffered childhood abuse, racial harassment, and other misfortunes—and even evidence that he had a history of academic failure, which is obviously correlated with intellectual disability—poses an enormous additional hurdle to be overcome for *Atkins* eligibility.

The CCA's *Briseno* factors, moreover, conflict with current medical standards because they are inconsistent with clinical standards. The *Briseno* factors are unapologetically non-clinical—and indeed they are anti-clinical. The *Briseno* factors are rooted in lay misconceptions of intellectual disability; they are erroneously derived from the literary character Lennie; and they are based, at least in part, on the fundamental misconception that only a subset of those diagnosed as intellectually disabled may be excluded from execution. *See, e.g.*, *Briseno*, 135 S.W.3d at 6 (asking whether "a consensus of Texas citizens" would agree that persons "whom the mental health profession might diagnose as meeting the criteria for mental retardation" but who are less impaired than "Steinbeck's Lennie" should be exempt from the death penalty); *Sosa*, 364 S.W.3d at 892.

For these reasons, the CCA's decision in this case violates the Eighth Amendment. Its wholesale disregard of current medical standards "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1990. Under this Court's decisions, and the Eighth Amendment, an individual's claim to intellectual disability in the *Atkins* context must be informed by current medical standards.

ARGUMENT

The CCA's prohibition on the use of current medical standards in intellectual disability determinations is unconstitutional. *First*, *Atkins* and *Hall* recognize that current medical standards may not be excluded in considering intellectual disability. *Second*, the prohibition on the use of current medical standards in this case has profound consequences and violates Moore's Eighth Amendment rights.

I. *ATKINS* AND *HALL* MAKE CLEAR THAT PROHIBITING THE USE OF CURRENT MEDICAL STANDARDS IN INTELLECTUAL DISABILITY DETERMINATIONS IN CAPITAL PROCEEDINGS VIOLATES THE EIGHTH AMENDMENT

The Eighth Amendment categorically prohibits the execution of persons with intellectual disability. The Court's analysis of this constitutional principle is thoroughly grounded in the clinical and medical understanding of intellectual disability.

In *Atkins*, the Court prominently relied on the clinical definitions of mental retardation provided by the AAMR and the APA in reaching its conclusion that execution of the "mentally retarded" violates the Eighth Amendment. At the outset of its opinion, the Court quoted the clinical definitions from these two leading mental health authorities. *See Atkins*, 536 U.S. at 308 n.3. In the core of its Eighth Amendment analysis, the Court similarly relied on these "clinical definitions of mental retardation." *Id.* at 318. Then, using the clinical definitions as a linchpin of the analysis, the Court concluded: "Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude

that such punishment [the death penalty] is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321 (internal quotation marks omitted). While the Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction," *id.* at 317, it recognized that the states' "statutory definitions of mental retardation . . generally conform to the clinical definitions" relied upon by the Court. *Id.* at 317 n.22. "The clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*," *Hall*, 134 S. Ct. at 1999, and *Atkins* relied on "the diagnostic criteria employed by psychiatric professionals." *Id.* at 2000.

Similarly, in *Hall*, this Court emphasized that, "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct. at 1993. The Court explained:

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the medical condition at issue.

Id. The Court carefully considered the views of "the medical community," the "established medical practice," and the "professional explanations" in evaluating Florida's absolute numerical cut-off for IQ

scores. *Id.* at 1994–96. Recognizing the Court's statement in *Atkins* that States have "the task" of devising means to enforce the constitutional principle, the Court emphasized that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection," *id.* at 1998, and that *Atkins* did not give States plenary authority to reject clinical definitions. *Id.* at 1998–99. The reason for this limitation is clear and of surpassing importance: "If States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999. Accordingly, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Id.* at 2000.

Atkins and *Hall* both also recognized that "the medical community's diagnostic framework," in the intellectual disability context, is best found in the current editions of the AAMR/AAIDD's clinical manual and the APA's Diagnostic and Statistical Manual of Mental Disorders. *Atkins* relied on these two authorities for its understanding of "mental retardation." *See, e.g.*, 536 U.S. at 308 n.3, 317 n.22, 318. *Atkins* also relied on the most current versions of both authorities—the ninth edition of the AAMR's clinical manual, published in 1992, and the fourth edition of the DSM (DSM-IV-TR), published in 2000. *Id.* at 308 n.3, 317 n.22.[16] *Hall* similarly relied on

---

[16] The DSM-IV-TR did not alter the substantive criteria of any disorders in the DSM-IV, published in 1994, but instead revised "the descriptive text that accompanies the criteria sets

the AAIDD manual and the DSM as the leading authorities on the medical and clinical understanding of intellectual disability. *See, e.g.*, 134 S. Ct. at 1994, 2000. Indeed, the Court referred to the DSM as "one of the basic texts used by psychiatrists and other experts." *Id.* at 1990. As in *Atkins*, moreover, the Court relied on the most current versions of those authorities—the AAIDD manual's eleventh edition, published in 2010, and the DSM-5, published in 2013. *Id.* at 1990, 1994, 2000.

The authorities used by the Court in *Atkins* and *Hall* explicitly recognize that clinical knowledge and clinical standards evolve as the medical community seeks improvements and advances in medical understanding. Both authorities invoked in *Atkins* emphasized that medical and clinical knowledge is continually advancing. *See, e.g.*, AAMR 1992 Manual, ix; DSM-IV-TR, xxviii. The authorities relied upon in *Hall*, in turn, similarly emphasize that the medical and clinical method leads to improvements and advancements after rigorous study and review. *See, e.g.*, AAIDD 2010 Manual, xiii-xvi; DSM-5, 5.

Accordingly, in *Atkins* and *Hall*, this Court made clear that (1) the Eighth Amendment-mandated inquiry into intellectual disability must be informed by the medical diagnostic framework and (2) the medical diagnostic framework is determined by current medical standards. Just as there would be no sound clinical reason to use superseded medical standards and prohibit consideration of current medical stand-

---

for DSM-IV disorders" to reflect information that had become available since the DSM-IV. APA, *Diagnostic and Statistical Manual of Mental Disorders*, xxix (4th ed. 2000) (hereinafter, DSM-IV-TR").

ards in making a diagnosis, there is no sound legal basis for relying on superseded medical standards and prohibiting consideration of current medical standards in conducting the intellectual disability inquiry under *Atkins*.

A rejection of governing medical standards also would create grave practical problems. Medical experts, whose discipline requires them to apply current standards, would need to diagnose and evaluate individuals artificially based on past standards —a requirement that would be both pointless for clinical purposes and groundless.

A rule prohibiting consideration of current medical standards, such as that announced by the CCA in this case, starkly conflicts with *Atkins*, *Hall*, and the Eighth Amendment. It violates both the Constitution and common sense.

II. THE CCA'S REJECTION OF CURRENT MEDICAL STANDARDS VIOLATES THE EIGHTH AMENDMENT

To determine whether Moore was intellectually disabled, the state habeas trial court in this case did what *Atkins* and *Hall* require: it consulted "the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. Noting that "[a]s our standards of decency evolve, so too do the standards of psychological diagnosis," the court explained that, in 2010, the AAIDD had published a new edition of its manual. App. 150a, ¶66. Applying current medical standards, it determined that Moore is intellectually disabled and constitutionally ineligible for the death penalty. App. 147a–154a, ¶¶58–76; 202a, ¶¶183–184.

The CCA determined that the state habeas trial court "erred by . employing the definition of intel-

lectual disability presently used." App. 6a. The CCA made fundamental errors in its analysis—and conflicted with the medical community's "diagnostic framework," *Hall*, 134 S. Ct. at 2000—by (1) rejecting consideration of current medical standards and (2) relying on its own clinically unsound *Briseno* factors. The CCA's errors arise from the CCA's view, which it has expressed since first addressing *Atkins* in *Briseno*, that medical standards must be viewed skeptically because of their supposed "subjectivity" and that not all persons who meet the clinical definition of intellectual disability should necessarily be ineligible for execution under *Atkins*. The CCA's approach is incompatible with *Atkins*, *Hall*, and the Eighth Amendment. It also is aberrational, with almost no support in the standards of any other states.

A. The CCA's Rejection Of Current Medical Standards Conflicts With The Medical Community's Diagnostic Framework

The three essential elements of intellectual disability—limitations in intellectual functioning, limitations in adaptive functioning, and early age of onset—have remained consistent. *See, e.g.*, *Atkins*, 536 U.S. at 308 n.3; *Hall*, 134 S. Ct. at 1994; AAIDD 2010 Manual, 7; DSM-5, 33, 40-41. At the same time, the medical community has made important strides in understanding and diagnosing intellectual disability in the last quarter century.

As explained in the AAIDD 2010 Manual, the medical community has an "evolving understanding of the disability and ID construct," and the organization correspondingly updates its manual approximately every decade to reflect the "current

understanding of the ID construct and guidelines to use in defining, diagnosing, and classifying individuals with ID." AAIDD 2010 Manual, xiii. The same is true with the DSM, with the 2013 edition of the DSM-5 updating and refining the 1994 edition of DSM-IV based on diagnostic advances. As the DSM-5 explains: "it is important to emphasize that the current diagnostic criteria are the best available description of how mental disorders are expressed and can be recognized by trained clinicians." DSM-5, xli; *see also id.* at 5 (noting that "[t]he science of mental disorders continues to evolve").

In light of these clinical advances, it is clear and well understood that clinicians should not "rely[] on past language, definitions, and models of mental retardation." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports*, xii (10th ed. 2002). Yet that is precisely what the CCA has required here.

By adopting a head-in-the-sand approach to advances in the diagnostic framework for assessing intellectual disability, the CCA completely ignores advances in the medical community's understanding and assessment of intellectual disability over the last quarter century. Those improvements include clarifications regarding the role of IQ scores in assessing intellectual functioning and the evaluation of adaptive deficits.

Notably, the CCA did not dispute that the medical community's diagnostic framework has evolved and been updated in the intervening decades. Instead, it acknowledged that "[it] may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins*

and *Briseno* were decided"— just as the state habeas trial court determined they had. App. 6a. The CCA nevertheless concluded that, whatever the current diagnostic framework, courts in Texas may not be informed by it. App. 6a-7a. In reaching that determination, the CCA did not consider the substance of the clinical changes since 1992, much less apply them to Moore's claim. Instead, without *any* explanation or analysis, the CCA summarily asserted that the legal definition of intellectual disability that it had established in *Briseno* "remains adequately 'informed by the medical community's diagnostic framework.'" App. 7a. Not so—and the CCA's prohibition on considering current medical standards had profound effects in this case.

As Judge Alcala explained in her dissent, significant refinements have occurred with regard to both intellectual functioning and adaptive behavior: current standards place "greatly reduced" emphasis on IQ scores in the assessment of intellectual functioning and "rel[y] more on adaptive functioning than [earlier standards] did, both for diagnosing intellectual disability and for determining its level of severity." App. 107a, 112a.

Accordingly, it is important to consider the conflict between the CCA's decision and current medical standards with regard to both intellectual functioning and adaptive deficits.

Intellectual functioning – Current medical standards advise that IQ scores must be considered as part of a complete clinical inquiry, rather than standing alone with totemic significance.

The DSM-5 does not require the specification of a particular IQ score as an essential feature of the di-

agnosis of intellectual disability. This is in recognition of the fact that "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM-5, 37. In its text commentary, the DSM-5 continues to recognize that IQ scores are an important tool: it explains that "[i]ndividuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error," which generally "involves a score of 65-75." *Id.* The ultimate clinical inquiry into intellectual functioning, however, is focused on "deficits in intellectual functions . . . confirmed by both clinical assessment and individualized, standardized intelligence testing," such as IQ scores and standardized neuropsychological testing. *Id.* at 33; *see also* APA, *DSM-5 Intellectual Disability Fact Sheet*, https://www.psychiatry.org/psychiatrists/practice/dsm/dsm-5 ("By removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels.").

The AAIDD 2010 Manual, like the DSM-5, views intellectual functioning in terms of "intelligence," which it defines as "mental ability," including "reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience." AAIDD 2010 Manual, 31. With respect to IQ scores, the manual explains that "[t]he 'significant limitations in intellectual functioning' criterion for a diagnosis of intellectual disability is an IQ score . . . approximate-

ly two standard deviations below the mean, considering the standard error of measurement for the specific instruments used and the instruments' strengths and limitations." *Id.* Importantly, the AAIDD also emphasizes that "the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination," and stresses that "[a] fixed point cutoff score for ID is not psychometrically justifiable." *Id.* at 40.

The CCA's evaluation of intellectual functioning sharply conflicts with these current standards. The CCA treated two of Moore's IQ scores—scores of 74 and 78 (which the CCA cherry-picked from a series of IQ scores, including several IQ scores that were below 70)—as dispositive of Moore's *Atkins* claim.[17] After considering only those two selected scores, the CCA determined that Moore had "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning." App. 63a; *see also* 74a-75a. Such a conclusion cannot be reconciled with current medical practice.

First, and most fundamentally, the CCA's use of IQ scores as a closed box for determining the first prong—precluding consideration of any other clinical factors in evaluating intellectual functioning—sharply conflicts with the explicit recognition in current medical standards that IQ numbers alone, particularly when in the range of 70-75, should not be given dispositive significance in evaluating intellectual functions. As this Court recognized in *Hall*, "[i]ntellectual disability is a condition, not a number."

---

[17] Although the CCA did consider Moore's adaptive deficits (through its fundamentally flawed lens), it did so in the alternative. *See* App. 63a, 75a.

134 S. Ct. at 2001. It therefore is "unconstitutional to foreclose all further exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70." *Brumfield*, 135 S. Ct. at 2278 (internal quotation marks and citation omitted). Yet, notwithstanding guidance from this Court that "[i]t is not sound to view a single factor as dispositive" of "the conjunctive assessment necessary to assess an individual's intellectual ability," *Hall*, 134 S. Ct. at 2000–01 (citing DSM–5, 37), the CCA nevertheless chose to "disregard[] established medical practice," *id.* at 1995, in concluding that Moore failed to prove he had significantly subaverage general intellectual functioning based solely on his IQ scores of 74 and 78. This conclusion is contrary to both the DSM-5 and the AAIDD 2010 Manual. *See* AAIDD 2010 Manual, 40 (rejecting the use of a "fixed [IQ] cutoff score" for diagnosing intellectual disability); DSM-5, 37 (IQ scores are only "approximations of conceptual functioning"; "a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score").

The CCA further contradicted current medical standards by ignoring that Moore's IQ scores must be treated as ranges, not precise numbers. *See Brumfield*, 135 S. Ct. at 2278 (state court's conclusion that petitioner could not possess significantly subaverage intelligence with IQ test result of 75 was "an unreasonable determination of the facts"); *Hall*, 134 S. Ct. at 2001 (rejecting Florida's "rigid rule" treating IQ score in the marginal range as dispositive). Although the CCA stated that it recognized that "[t]here is a measurement error of approximately five points in

assessing IQ," App. 8a, it did not give Moore the benefit of this range. The CCA rejected the standard error of measurement in this case for two reasons, neither of which is sound under current medical standards.

The CCA first asserted that it would disregard the low end associated with Moore's IQ score of 74 in light of Moore's "history of academic failure," which it believed may have adversely affected his performance. App. 75a. In doing so, the CCA ignored the obvious fact that a history of academic failure supports a diagnosis of intellectual disability. *See* DSM-5, 34 (for "school-age children and adults" with mild intellectual disability "there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money"); *id.* at 38 ("associated features supporting diagnosis" of intellectual disability include, inter alia, "associated difficulties with . . . motivation in school"); *see also, e.g.*, Gilbert S. Macvaugh III & Mark D. Cunningham, Atkins v. Virginia*: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 163 (2009) ("academic achievement is usually adversely affected by mental retardation").

Second, the CCA also disregarded the low end of the range because Moore took the test while on death row, App. 74a-75a, thereby setting up a Catch-22 that *Hall* conspicuously avoided. *See Hall*, 134 S. Ct. at 1995 ("[a] score of 71 . . . is generally considered to reflect a range between 66 and 76," with no suggestion that low end of range should be disregarded because petitioner was on death row at time of test administration); Br. for Resp't at 3, 7-8, *Hall*, 134 S. Ct. 1986 (No. 12-10882) (test on which petitioner scored 71 was administered in 2002, long after death

sentence had been imposed). Thus, even under a strict numerical approach, the CCA's analysis did not comport with current medical standards. *See* DSM-5, 37 (individuals with intellectual disability often have IQ scores of approximately "65-75"); AAIDD 2010 Manual, 36.

In sum, by applying a strict cutoff based solely on two cherry-picked IQ scores (one of which was a 74), the CCA conflicted with current medical standards and established medical knowledge—and thus with *Atkins*, *Hall*, and the Eighth Amendment. *See also* App. 106a–111a (Alcala, J., dissenting) (analyzing the CCA's improper analysis of intellectual functioning).[18]

Adaptive deficits – As with intellectual functioning, current medical standards reflect clinical advances in understanding of adaptive deficits.

The DSM-5 places greater emphasis on the role of adaptive functioning and now assesses the levels of severity of intellectual disability based on adaptive functioning (rather than IQ scores). *See* DSM-5, 33-35. A finding of an adaptive deficit is warranted if an individual's conceptual, social, or practical capacity is sufficiently impaired that ongoing support is needed for the individual. *Id.* at 37. Importantly, the adaptive deficits are not balanced or offset against perceived adaptive strengths. *See, e.g.*, *id.* 33 (criterion is simply "[d]eficits in adaptive functioning,"

---

[18] The chasm between the CCA's approach and current medical standards is highlighted by the fact that *even the State's expert*, did not dispute that Moore satisfied the first prong of intellectual disability (intellectual functioning). *See* JA185, 189-90. The CCA's contrary conclusion was not shared by *any* of the clinicians who testified.

rather than a balancing of deficits and strengths). The DSM-5 also explicitly recognizes the difficulty in assessing deficits in adaptive functioning in highly controlled settings such as prisons. *Id.* at 38.

Like the DSM-5, the AAIDD 2010 definition, in assessing intellectual disability, also relies on deficits in conceptual, social, or practical skills, rather than a balancing of perceived adaptive strengths against adaptive deficits, in assessing intellectual disability. The AAIDD 2010 Manual explicitly recognizes that "[i]ndividuals with an [intellectual disability] typically demonstrate both strengths and limitations in adaptive behavior." AAIDD 2010 Manual, 47. Indeed, one of the "essential" assumptions of the AAIDD definition is that "[w]ithin an individual, limitations often coexist with strengths." *Id.* at 1. Thus, "in the process of diagnosing ID, *significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills.*" *Id.* at 47 (emphasis added). Similar to the DSM-5, AAIDD also takes the position that "'street smarts', behavior in jail or prison, or 'criminal adaptive functioning," should not be used to infer levels of adaptive behavior. AAIDD, *User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports*, 20 (2012) (hereinafter, "AAIDD 2012 User's Guide").

As with intellectual functioning, the CCA's analysis of adaptive deficits conflicts sharply with the current diagnostic framework it rejected.

First, under governing medical standards, the assessment of adaptive deficits focuses on those things that an individual *cannot* do in everyday life. Such

an inquiry does not involve "balancing" an individual's abilities or strengths against perceived deficits. AAIDD 2010 Manual, 45.[19] The inquiry is whether an individual has deficits in the "collection of conceptual, social [or] practical skills that have been learned and are performed by people in their everyday lives." *Id.* at 45.

The CCA, however, completely ignored the current diagnostic framework in assessing Moore's adaptive deficits. *Compare* App. 75a–91a *with* App. 180a–200a. Rather than focus on Moore's conspicuous adaptive deficits (such as his abysmal academic performance and withdrawn behavior throughout the developmental period), the CCA explicitly weighed his adaptive deficits against his perceived adaptive strengths as a means by which to negate a diagnosis of intellectual disability. *See* App. 11a; 80a–88a; *see also* App. 113a (Alcala, J., dissenting) ("The Court's majority opinion . . . gives heavy weight to [Moore's] ability to perform some of the functions listed above even though the current scientific community would discount that type of behavior as dispositive evidence of adaptive functioning.").

In conflict with medical standards, the CCA found, for instance, that Moore's significant conceptual, social, and practical deficits were outweighed by the fact that Moore had "lived in the back of a pool hall"

---

[19] *See generally* AAIDD 2010 Manual, 7 ("[P]eople with [intellectual disability] are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others. Individuals may have capabilities and strengths that are independent of their ID (e.g., strengths in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation).").

and "played pool and mowed lawns for money." App. 80a. The CCA further found that Moore's "adaptive skills" in prison, *see* App. 80a–88a (discussing "skills" ranging from playing dominos to completing commissary forms), belied a diagnosis of intellectual disability.[20] But, in addition to the inappropriate balancing of perceived strengths against adaptive deficits, current clinical guidelines explain that such evidence should be given little weight due to the highly-structured nature of the prison environment. *See* AAIDD 2012 User's Guide, 20 (diagnosis of intellectual disability should not be based on "behavior in jail or prison"); *see also* DSM-5, 38 ("[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers)"); *see also* App. 202a, ¶184 (state habeas trial court: "Mr. Moore's evidence of improvement in elementary school level reading and writing after three decades in a controlled environment on death row are not sufficient evidence to counter the large historical record and the testimony at the hearing").

Current clinical and medical standards, moreover, place greater emphasis on the crucial role of adaptive deficits in a diagnosis of intellectual disability. *See, e.g.*, DSM-5, 33-35; JA9, JA28. The CCA's rejection of the adaptive deficits here ignores – and conflicts with – this core principle of current standards.

Accordingly, the CCA's evaluation and dismissal of Moore's significant adaptive deficits simply cannot

---

[20] With respect to Moore's playing pool and dominos, clinical guidance recognizes that some individuals with intellectual disability often have "[r]ecreational skills [that] resemble those of age-mates." DSM-5, 34.

be reconciled with the current diagnostic framework.[21]

Relatedness – The CCA also departed from current medical standards by discounting Moore's significant adaptive deficits based on an overly broad and clinically unwarranted notion of "relatedness."

The CCA fundamentally misinterprets the clinical element of "relatedness." Far from creating some onerous additional causation hurdle to establish intellectual disability, the notion of a relationship between intellectual deficits and adaptive deficits is routine and unexceptional. If there is no relationship at all between intellectual deficits and adaptive deficits, then addressing the adaptive deficits by taking into account the intellectual deficits makes no sense. To give a common example that is offered for teaching purposes in the clinical world, if an individual cannot read (an adaptive deficit) and is blind, then the adaptive deficit may well be unrelated to the intellectual deficit. The same may be true if adaptive deficits—shortcomings in dealing with the day-to-day world—result, for example, solely from cultural differences. The recognition that it makes clinical sense to examine whether adaptive deficits are associated with a wholly different factor from intellectual deficits is longstanding and well-understood.

In sharp contrast to this common-sense clinical approach, the CCA now has established "relatedness" as a major additional hurdle that must be overcome

---

[21] Moore's position is—and has been—that he also is intellectually disabled under previous medical standards. The improvements and advances in current medical standards, however, make it even more clear that he is intellectually disabled.

before an individual with intellectual deficits and adaptive deficits may be protected by the Eighth Amendment right recognized by *Atkins* and *Hall*.

Here, the CCA seized upon the word "related" to summarily (and erroneously) determine that Moore's significant academic and social deficits "were caused by a variety of [other] factors": "trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary school three times in three years, racially motivated harassment and violence at school, a history of academic failure, drug abuse, and absenteeism." App. 88a–89a. In so holding, the CCA completely disregarded current clinical guidance that environmental challenges and other disorders can, and frequently do, coexist with and contribute to intellectual disability. *See, e.g.*, DSM-5, 40 ("co-occurring . . . conditions are frequent in intellectual disability").[22] The CCA did not explain how it determined that any or all of the "variety of [other]

---

[22] Even while prohibiting, as a general matter, use of current medical standards, the CCA mistakenly suggests that "relatedness" is a new standard in the DSM-5 and that it is entirely absent from the AAIDD. App. 6a. While the use of the word "related" is not in the tenth and eleventh editions of the AAIDD, the principle underlying the concept—in its appropriate clinical sense—is widely accepted, including in the AAIDD. Tellingly, the CCA's invocation of current medical standards is plainly erroneous and distorted—and arises only when, in the CCA's view, the current medical standard undermines the intellectual disability claim. The CCA similarly invokes DSM-5 on "executive functioning" in an effort to reject Borda's diagnosis, App. 87a n.57, but its brief footnote reference fundamentally misinterprets the DSM-5, *see, e.g.*, DSM-5, 37 (indicating that intellectually disabled adults may reflect adaptive deficits in the conceptual domain through impaired executive function), which the CCA otherwise declined to consider.

factors" it identified had in fact "caused" any or all of Moore's adaptive deficits. Nor did it cite any clinical or scientific support for this causation inquiry, which is unsurprising since that inquiry is completely alien to the medical community's diagnostic framework.

Indeed, remarkably, the CCA treated risk factors and associated features of intellectual disability, which *support* its diagnosis under clinical standards, as *refuting* a diagnosis here. For instance, the current diagnostic framework recognizes that "risk factors for intellectual disability" include, among other things, "child abuse and neglect," "domestic violence," "impaired parenting," "inadequate early intervention services," "inadequate special education services," and "inadequate family support." AAIDD 2010 Manual, 60; *see also id.* at 59 ("[i]ndividuals may be born with perfectly normal DNA and still develop ID due to a birth injury, malnutrition, child abuse, or extreme social deprivation"). The DSM-5 similarly recognizes that "associated features supporting diagnosis" of intellectual disability include, inter alia, "associated difficulties with . . . motivation in school," "victimization" and "risk for physical . . . abuse." DSM–5, 38, 40. Thus the very factors that the CCA used to dispense with Moore's diagnosis of intellectual disability, actually support, under current medical standards, a diagnosis of intellectual disability, as the state habeas trial court found. *See* App. 129a-147a, 201a ¶179 (analyzing Moore's numerous risk factors for intellectual disability and concluding that "[a]n extraordinary number of the risk factors commonly associated with mental retar-

dation were present prior to Mr. Moore's 18th birthday").[23]

By requiring Moore to prove that his deficits in adaptive functioning were caused specifically and exclusively by his intellectual deficits—where there is no such requirement in clinical guidelines and where the clinical guidance suggests that the "unrelated" factors, in fact, support a diagnosis of intellectual disability—the CCA created an "unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1990.[24]

---

[23] The CCA's clinically unsound interpretation of the "relatedness" requirement is especially troubling in light of its possible consequences. For example, under the CCA's analysis Moore's experience as a victim of "racially motivated harassment" and child abuse, App. 88a-89a, meant that he had an additional requirement to entirely exclude racial harassment and child abuse as possible contributing factors to his adaptive deficits. That holding is unsupported by current medical standards and clinical judgment, which do not suggest that victims of racial harassment and child abuse face an additional substantial hurdle in proving intellectual disability.

[24] Based in significant part on its distortion of the relatedness requirement in conflict with current medical standards, the CCA erroneously stated that the state habeas trial court erred by not making a relatedness finding. The CCA, however, previously had stated that relatedness meant that "adaptive limitations must be related to a deficit in intellectual functioning *and not a personality disorder*." *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010) (emphasis added). In its findings of fact, the state habeas trial court expressly acknowledged the CCA's holding in *Hearn* that adaptive deficits must be related to subaverage intellectual functioning instead of a personality disorder, App. 161a, ¶92, and, noting that no party had alleged that Moore suffered from a personality disorder, App. 161a-162a, ¶94, found no reason to question that Moore's adaptive deficits were related to his subaverage intellectual functioning, *see* App. 161a-162a, ¶¶94-95. In addition, the state

The CCA's rejection of current medical standards unquestionably had a profound impact on this case. Two of the three mental health experts testifying in support of Moore's claim emphasized the differences in current standards. *See* JA8, JA21, JA27–28, JA114. The state habeas trial court relied upon current medical standards in finding Moore intellectually disabled and ineligible for execution, App. 150a, ¶66; App. 163a, ¶97, and the use of current standards was a principal point of difference between the majority and the dissent regarding Moore's intellectual disability. App. 6a–7a; App. 98a. Thus, the role of current medical standards permeated the record of Moore's *Atkins* hearing from start to finish. The CCA's irrational prohibition on considering current medical standards fundamentally distorted its constitutionally mandated inquiry.

Finally, it is important to emphasize that the CCA's prohibition on the use of current medical standards in assessing an *Atkins* claim is unusual and highly idiosyncratic. Even Texas itself considers current medical standards in assessing intellectual disability in other areas. *See, e.g.*, 37 Tex. Admin. Code § 380.8779(e)(2)(B) (youth may not be discharged from juvenile justice program based on intelintellectual disability unless diagnosed "by a licensed psychologist *based upon the most recent edition* of the Diagnostic and Statistical Manual of the American Psychiatric Association") (emphasis added). Peti-

---

habeas trial court explicitly relied on and incorporated the determinations of intellectual disability by the experts and clinicians supporting Moore's claim of intellectual disability, and none expressed any doubt that they were related in diagnosing Moore.

tioner is not aware of any other states that have prohibited consideration of current medical standards and instead required the use of an outdated medical standard. Indeed, since *Hall*, state high courts presented with the issue consistently have held that current medical standards should be considered in resolving *Atkins* claims.[25] Particularly in light of the aberrational nature of the CCA's illogical rule, there is no sound basis for departing from the accepted medical consensus—that current medical standards should inform the intellectual disability determination. *See generally Hall*, 134 S. Ct. at 1996–98 (practices of other states supported conclusion that medical consensus should be followed).

***

Using its own unsound standard that references a 1992 definition of intellectual disability, the CCA rejected the state habeas trial court's finding—which was based on current medical standards—that Moore had met his burden of showing that he is intellectually disabled. With respect to intellectual deficits, Moore has a "mean full-scale IQ score of 70.66"—which is well within "the range of mild mental retardation," App. 201a, ¶180, and which includes numerous IQ scores under 75. With respect to adaptive deficits, Moore scored 2.5 standard deviations below the mean on a generally accepted standardized test of adaptive behavior and has a history of con-

---

[25] *See, e.g., Oats v. State*, 181 So.3d 457, 467-68 (Fla. 2015); *State v. Agee*, 364 P.3d 971, 989-91 (Or. 2015); *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015); *cf. Com. v. Bracey*, 117 A.3d 270, 273-74 & nn.4-5 (Pa. 2015) (*Atkins* claim resolved using AAIDD or DSM manual current at time of *Atkins* hearing).

spicuous adaptive deficits, *see* JA200–201; under current standards, a score of two standard deviations below the mean "meet[s] the operational definition of a significant limitation in adaptive behavior," AAIDD 2010 Manual, 46. Even the State's expert acknowledged "limitations in [Moore]'s academic skills and some adaptive deficits in social interaction during the developmental period," App. 80a, and Moore's experts testified as to adaptive deficits in all three skill domains, *see* App. 180a-200a. Under current medical standards, a significant limitation in just one domain is sufficient to establish intellectual disability when coupled with significant limitations in intellectual functioning and onset before adulthood—all of which are established in the record here. By prohibiting consideration of those current medical standards in assessing Moore's *Atkins* claim (and in setting that standard for all current and future *Atkins* claims in Texas), the CCA's decision violated the Eighth Amendment.

B. The CCA's Approach Rejects Current Medical Standards Because It Relies On Non-Clinical Factors That Conflict With Medical Consensus

Closely related to the CCA's rejection of current medical standards is its reliance on non-clinical factors that conflict with current medical standards.

In *Briseno*, while invoking the AAMR's 1992 definition of intellectual disability (which it now has frozen in time), the CCA also directed Texas courts to use a list of non-clinical factors in assessing an individual's adaptive deficits. These concededly "non-diagnostic" *Briseno* factors, *Ex parte Van Alstyne*, 239

S.W.3d 815, 820 (Tex. Crim. App. 2007), were created out of whole cloth by the CCA and have no medical or clinical foundation. By injecting unsound non-clinical criteria into Texas's diagnostic framework for assessing intellectual disability, the CCA has run further afoul of current medical standards—and further violated the Eighth Amendment protections recognized by this Court in *Atkins* and *Hall*.

The *Briseno* factors arose from the CCA's explicit distrust of the clinical framework, which it viewed as "exceedingly subjective." *Briseno*, 135 S.W.3d at 8.[26] The factors were created by the CCA after it expressed its erroneous view that not all individuals who meet the clinical definition of intellectual disability should necessarily be exempt from the death penalty in Texas. As *Briseno* explained:

> Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But, does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? Put an-

---

[26] *See also, e.g.*, *Ex parte Cathey*, 451 S.W.3d 1, 10 n. 22 (Tex. Crim. App. 2014) (criticizing the "subjective" nature of the clinical inquiry and explaining that *Briseno* factors provide a more "objective" basis to "assess[] the type of intellectual disability concerns raised by the *Atkins* court"); *id.* ("[t]his definitional subjectivity is the primary reason why we developed the seven, more objective, *Briseno* factors"); App. 6a-7a (emphasizing "the subjectivity surrounding the medical diagnosis of intellectual disability").

> other way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria?

Id. at 6. Although the CCA declined to expressly answer those normative questions, it nevertheless proceeded to adopt a definition of intellectual disability that limited *Atkins*' Eighth Amendment protecprotections in Texas to those defendants who had "th[e] level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.* Indeed, in the years since *Briseno*, the CCA has reiterated its view that in Texas, the only defendants clearly protected from execution under *Atkins* are those with "*severe* mental retardation": "in borderline cases, where IQ scores are near the threshold of mild retardation," it is the CCA's opinion that "whether [a] defendant is mentally retarded for particular clinical purposes is instructive" but is not necessarily dispositive. *Sosa*, 364 S.W.3d at 892 (emphasis added). In such cases, the non-clinical *Briseno* factors are used to answer the question whether a mildly intellectually disabled defendant has "limitations in adaptive functioning [that are] the sort of limitations . . . that it would violate the Eighth Amendment to execute him." *Id.*

Most fundamentally, in *Briseno*, the CCA viewed it as an open question whether there is "a 'mental retardation' bright-line exemption from our state's maximum statutory punishment." 135 S.W.3d at 6.

Atkins and *Hall* definitively hold that the Eighth Amendment requires precisely that "bright line."

Since their inception, the *Briseno* factors have been widely and severely criticized as unscientific and contrary to clinical practice. *See, e.g.*, John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 689, 710, 711-12 (2009) ("The *Briseno* factors present an array of divergences from the clinical definitions."); American Bar Association, *The Texas Capital Punishment Assessment Report* 395 (Sept. 2013) ("The *Briseno* factors create an especially high risk that a defendant with mental retardation will be executed because, in many ways, they contradict established methods for diagnosing mental retardation."); Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721, 728 (2008) (*Briseno*'s "court-crafted overlay for assessing deficits in adaptive behavior in capital cases is not grounded in professional practice or guidelines"); *see also* App. 97a & n.5 (Alcala, J., dissenting) (citing numerous journal articles "criticiz[ing]" the *Briseno* Court for "applying an unscientific standard" to assess intellectual disability). Indeed, one analysis concludes that the Briseno *factors*—"creeped out of non-clinical whole-cloth" to "make it extraordinarily difficult to prove deficits in adaptive functioning"—and Florida's pre-*Hall* IQ-score cutoff are "[t]he two most pronounced examples" of state standards that "make it more difficult for persons with intellectual disability to prevail." John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. 393, 399

(2014). This criticism is well founded.

The first factor, for instance, asks whether family or friends who knew the defendant during his developmental stage "th[ought]" he was "mentally retarded." *Briseno*, 135 S.W.3d at 8. This, in turn, incorporates whatever lay stereotypes one's childhood community may have had about what an intellectually disabled person is like. Relying on such testimony, without a corresponding clinical evaluation, is particularly problematic for "[i]ndividuals with [intellectual disability] with higher IQ scores" because such individuals are generally "physically indistinguishable from the general population"—notwithstanding popular views to the contrary. AAIDD 2012 User's Guide, 26–27 (highlighting a number of "incorrect stereotypes" about individuals with intellectual disability, including that "'if you don't have the look (as in Down syndrome) then you are not intellectually disabled'").

Other *Briseno* factors similarly permit factfinders to reject an *Atkins* claim based on "stereotypes of what persons with intellectual disability can (and cannot) do." Blume et al., *A Tale of Two (and Possibly Three)* Atkins, *supra*, at 405. For example, the factors ask whether a defendant has "formulated plans," "respond[s] coherently" to questions, or can "hide facts or lie effectively." *Briseno*, 135 S.W.3d at 8. None of these criteria, however, is considered in any known clinical assessment, because none of these behaviors is inconsistent with a diagnosis of intellectual disability. *See generally* AAIDD 2012 User's Guide, 26 (highlighting "incorrect stereotypes" about individuals with intellectual disability).

Also deeply problematic from a medical-standards perspective is the last *Briseno* factor—which focuses on the commission of the defendant's offense—and whether or not it seems consistent with a diagnosis of intellectual disability. This factor is completely at odds with clinical guidance on the issue:

> Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior. The diagnosis of intellectual disability is based on meeting three criteria: significant limitations in intellectual functioning; significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills; and age of onset prior to age 18. The diagnosis of [intellectual disability] is not based on the person's 'street smarts', behavior in jail or prison, or 'criminal adaptive functioning.'

AAIDD 2012 User's Guide, 20; Macvaugh & Cunningham, *supra*, at 169 ("Evaluators are discouraged from utilizing criminal behavior to ascertain the presence or absence of deficits in adaptive functioning.").[27] This factor encourages the factfinder to focus on a particular, uncommon event in assessing the defendant's adaptive behavior—the commission of the offense—notwithstanding that "[a]daptive behavior . . . is the collection of conceptual, social, and

---

[27] Indeed, notwithstanding the prominent role that the CCA gave Steinbeck's "Lennie" in *Briseno*, it is unclear whether even Lennie could satisfy the CCA's self-created definition of intellectual disability because, among other things, "[a]fter committing the murder, [Lennie] went to great lengths to conceal his crime, including hiding the body." Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, *supra*, at 732-33.

practical skills that have been learned and are performed by people *in their everyday lives*." AAIDD 2010 Manual, 45 (emphasis added); *see also id.* (a "key point" is that adaptive behavior is assessed based on a person's "typical" performance); *accord* DSM-5, 33. Such "diagnosis by anecdote" is improper as well as circular insofar as the fact that a capital crime was committed may be used to negate a diagnosis of intellectual disability.

Notably, in the twelve years since Texas adopted the *Briseno* factors, only one other state high court has authorized use of these non-clinical factors, and only in limited circumstances involving malingering. *Bracey*, 117 A.3d at 287; *Com. v. Williams*, 61 A.3d 979, 982 n.9 (Pa. 2013). One other state intermediate appellate court also has applied them in unreported opinions. *See, e.g., Howell v. State*, No. W2009-02426-CCA-R3PD, 2011 WL 2420378, *18 (Tenn. Crim. App. June 14, 2011). Thus, at least twenty-eight of the thirty-one states with the death penalty do not use the *Briseno* factors. The nineteen states without the death penalty of course also do not use the *Briseno* factors. Accordingly, at least forty-seven of the fifty states do not use the *Briseno* factors that the CCA crafted in response to its skepticism of clinical factors and its goal to limit the number of individuals who may receive *Atkins* protection to a subset of those who meet the clinical definition.[28]

---

[28] While the Fifth Circuit has upheld Texas's *Briseno* factors, *see, e.g., Butler v. Stephens*, 625 F. App'x 641, 649-50 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1656 (2016), Petitioner respectfully submits that, as numerous legal and medical analyses have explained, that view is erroneous.

All the problems with the *Briseno* factors, and their non-clinical, anti-clinical nature, are abundantly present in this case. Here, the CCA found that the *Briseno* factors "weigh[ed] heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning." App. 89a. In so concluding, the CCA continued its single-minded focus on Moore's purported strengths: *e.g.*, that he tried, on occasion, to earn money from neighbors to buy food when he and his siblings were hungry (even though the record also shows that he ate from trash cans—even after getting food poisoning, App. 137a-138a, ¶33; 192a, ¶ 166; 197a–198a, ¶172(c)); that he submitted numerous *pro se* pleadings (minimizing evidence that he likely was assisted by fellow prisoners, *see, e.g.*, CR 3082-3084, App. 115a); and that the bungled robbery in which he participated "required forethought, planning, and moderately complex execution of purpose" (notwithstanding that two other individuals were involved, and notwithstanding that it went badly awry, *Moore*, 194 F.3d at 593-94).

What emerges, then, is *not* a determination of whether Moore is intellectually disabled under the current diagnostic framework. Instead, the CCA's decision in this case reflects its view that, regardless of whether he satisfies the current diagnostic framework, Moore lacks the "*level and degree of mental retardation at which a consensus of Texas citizens* would agree that [he] should be exempted from the death penalty"—*i.e.*, Moore does not resemble "Steinbeck's Lennie." *Briseno*, 135 S.W.3d at 6; *see also Sosa*, 364 S.W.3d at 892 (reiterating that, in Texas, in cases "where IQ scores are near the threshold of

mild retardation" not all individuals who are intellectually disabled under clinical guidelines will be protected by the Eighth Amendment). But neither *Atkins* nor *Hall*, with their definitive holdings that the Eighth Amendment categorically prohibits the execution of the intellectually disabled, countenances excluding individuals with intellectual disability from the Eighth Amendment protection based on a view of whether the Texas populace would want to see that person executed. Indeed, a stated purpose of *Briseno*—to identify a smaller group of "mentally retarded" individuals for *Atkins* purposes than for other purposes—sharply conflicts with this Court's decisions. *See, e.g.*, *Hall*, 134 S. Ct. at 1993 ("[T]he definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans."); *see also Roper v. Simmons*, 543 U.S. 551, 563 (2005) (reiterating that in *Atkins*, "the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders").

By relying on lay impressions, stereotypes and non-diagnostic criteria, the *Briseno* standard risks allowing the execution of individuals with intellectual disability—like Moore—whose impairments, though constitutionally significant, may be less obvious and less severe than those of other individuals. *See* App. 117a–118a (Alcala, J., dissenting) ("[T]he Lennie standard does not meet the requirements of the federal Constitution because it potentially permits the execution of a mildly or moderately intellectually disabled offender who meets the legal definition of *Atkins*, and it categorically limits

the protections of the Eighth Amendment to those offenders determined to be severely or profoundly intellectually disabled."); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill Rts. J. 467, 481 (2014) ("Using these seven [*Briseno*] factors as part of a diagnosis has the potential . . . to exclude anyone functioning in the mild [intellectual disability] range from the protection of *Atkins*."); Macvaugh & Cunningham, *supra*, at 136 ("The seven criteria of the *Briseno* opinion operationalize an *Atkins* interpretation that only exempts a subcategory of persons with mental retardation from execution.").

As this Court recently reiterated in *Hall*, "[t]he death penalty is the gravest sentence our society may impose." 134 S. Ct. at 2001. If that sentence is to be imposed on a person claiming intellectual disability, States must assess that claim according to a standard that is informed by the current views of the medical community. Texas, however, refuses to do so. Instead, it deploys its non-clinical *Briseno* factors to conclude that individuals, like Moore, are not intellectually disabled for Eighth Amendment purposes in Texas, even if they are intellectually disabled under current medical standards (as the state habeas trial court determined here) and would therefore be exempt from execution in other states.

Because nothing in *Atkins or Hall* authorizes the states to narrow the scope of the substantive Eighth Amendment right afforded by this Court by defining intellectual disability in a way that encompasses only a subset of defendants who are intellectually disabled under current clinical standards, the CCA's use of its *Briseno* factors—which conflict with current medical standards—to deny Moore's *Atkins* claim provides yet

an additional ground for reversal and further reflects and aggravates the constitutional error from the CCA's rejection of current medical standards.

CONCLUSION

This Court should reverse the judgment of the Texas Court of Criminal Appeals and vacate Bobby James Moore's death sentence.

Respectfully submitted,

Alex Blaszczuk
Peter Horn
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Luke Varley
601 Lexington Avenue
New York, NY 10022

Clifford M. Sloan
Counsel of Record
Lauryn K. Fraas
Donald P. Salzman
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

July 28, 2016

Supreme Court, U.S.
FILED
SEP - 6 2016
OFFICE OF THE CLERK

No. 15-797

In the Supreme Court of the United States

BOBBY JAMES MOORE, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE RESPONDENT

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

RANCE CRAFT
MICHAEL P. MURPHY
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

QUESTION PRESENTED

Atkins v. Virginia, 536 U.S. 304 (2002), held that the Eighth Amendment prohibits the execution of persons with intellectual disability. That holding rested on the Court's finding that state laws reflected a national consensus against executing offenders with that condition, as well as the Court's independent assessment that there was no reason to disagree with the States' judgment. *Id.* at 315-16, 321. The Court observed that any "serious disagreement" about this principle lay "in determining which offenders are in fact" persons with intellectual disability, and it "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction.'" *Id.* at 317 (citation omitted).

Hall v. Florida, 134 S. Ct. 1986, 1998 (2014), reaffirmed the States' "critical role" in defining intellectual disability for Eighth Amendment purposes. And while the Court added that its independent evaluation of this question would also be "informed by the views of medical experts," it stressed that those views "do not dictate" the answer because "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Id.* at 2000.

The question presented is whether the Eighth Amendment requires States to adhere precisely to a particular organization's most recent clinical definition of intellectual disability in determining whether a person is exempt from the death penalty under *Atkins* and *Hall*.

TABLE OF CONTENTS

Page

Introduction 1
Statement 3
A. Factual Background 3
B. Judicial Proceedings 5
Summary of Argument 16
Argument 19
I. The Court of Criminal Appeals Correctly Denied Petitioner's *Atkins* Claim. 19
A. Texas's Definition of Intellectual Disability Properly Implements *Atkins*. 19
1. *Atkins* and *Hall* do not require States to adopt wholesale the latest intellectual-disability definitions published by select professional groups. 21
2. No national consensus requires wholesale use of a particular organization's latest clinical definition. 25
3. Requiring States to strictly adhere to either the APA's or AAIDD's latest clinical definition would be unworkable and unwarranted. 27
4. Texas's definition of intellectual disability satisfies *Atkins* and *Hall*. 33
B. The Court of Criminal Appeals Correctly Concluded That Petitioner Did Not Meet His Burden to Prove Intellectual Disability 38

1. The CCA correctly held that petitioner failed to meet his burden on intellectual functioning. 40
2. The CCA correctly held that petitioner failed to meet his burden on adaptive functioning. 44
3. The CCA correctly held that petitioner failed to meet his burden to show that his asserted adaptive functioning deficits are directly "related" to his asserted intellectual functioning deficits. 48

II. Alternatively, This Court Could Remand for the Court of Criminal Appeals to Give Further Consideration to the Most Recent Clinical Definitions of Intellectual Disability. 50

III. The Optional *Briseno* "Relatedness" Factors Do Not Render Texas's Three-Part Definition of Intellectual Disability Unconstitutional. 51

Conclusion 58

Appendix – Comparison of State *Atkins* Standards and Clinical Definitions 1a

Cases:

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*
Black v. Bell,
664 F.3d 81 (6th Cir. 2011) 32
Bobby v. Bies,
556 U.S. 825 (2009) 22
Brumfield v. Cain,
135 S. Ct. 2269 (2015) 43, 46, 55
Brumfield v. Cain,
808 F.3d 1041 (5th Cir. 2015) 37, 43, 55
Chase v. State,
171 So. 3d 463 (Miss. 2015) (en banc) 25, 26, 37
Chester v. Thaler,
666 F.3d 340 (5th Cir. 2011) 22, 55
Clark v. Arizona,
548 U.S. 735 (2006) 28
Clark v. Quarterman,
457 F.3d 441 (5th Cir. 2006) 47
Commonwealth v. Bracey,
117 A.3d 270 (Pa. 2015) 25, 26, 27, 37
Commonwealth v. Hackett,
99 A.3d 11 (Pa. 2014) 27
Ex parte Bell,
152 S.W.3d 103 (Tex. Crim. App. 2004) 34
Ex parte Briseno,
135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*
Ex parte Cathey,
451 S.W.3d 1 (Tex. Crim. App. 2014) 35, 52, 56
Ex parte DeBlanc,
No. AP-75113, 2005 WL 768441
(Tex. Crim. App. Mar. 16, 2005) 34

Ex parte Hearn,
310 S.W.3d 424 (Tex. Crim. App. 2010) 35

Ex parte Maldonado,
No. WR–51612–02, 2013 WL 2368771
(Tex. Crim. App. May 22, 2013) 34

Ex parte Martinez,
No. WR–58,358–02, 2016 WL 3457224
(Tex. Crim. App. June 15, 2016) 34

Ex parte Modden,
147 S.W.3d 293 (Tex. Crim. App. 2004) 34

Ex parte Plata,
No. AP-75820, 2008 WL 151296
(Tex. Crim. App. Jan. 16, 2008) 34

Ex parte Simms,
No. AP-75625, 2007 WL 602814
(Tex. Crim. App. Feb. 28, 2007) 34

Ex parte Smith,
No. AP-76906, 2012 WL 5450895
(Tex. Crim. App. Nov. 7, 2012) 34

Ex parte Sosa,
364 S.W.3d 889 (Tex. Crim. App. 2012) 52

Ex parte Tennard,
960 S.W.2d 57
(Tex. Crim. App. 1997) (en banc) 19

Ex parte Valdez,
158 S.W.3d 438 (Tex. Crim. App. 2004) 34

Ex parte Van Alstyne,
239 S.W.3d 815 (Tex. Crim. App. 2007) 34, 57

Faretta v. California,
422 U.S. 806 (1975) 5

Ford v. Wainwright,
477 U.S. 399 (1986) 19, 34

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 51
Gray v. Epps,
616 F.3d 436 (5th Cir. 2010) 31
Hall v. Florida,
134 S. Ct. 1986 (2014) ..... *passim*
Hill v. Humphrey,
662 F.3d 1335 (11th Cir. 2011) (en banc) 22
Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 22, 31, 47
Kansas v. Crane,
534 U.S. 407 (2002) 23, 28
Kansas v. Hendricks,
521 U.S. 346 (1997) 21, 32
Larry v. Branker,
552 F.3d 356 (4th Cir. 2009) 22
Ledford v. Warden, Ga. Diagnostic & Classification Prison,
818 F.3d 600 (11th Cir. 2016) 24, 31, 43
Lindh v. Murphy,
521 U.S. 320 (1997) 6
Mays v. Stephens,
757 F.3d 211 (5th Cir. 2014) 24, 35, 43, 55
McManus v. Neal,
779 F.3d 634 (7th Cir. 2015) 31
Moore v. Johnson,
194 F.3d 586 (5th Cir. 1999) 6
Moore v. State,
700 S.W.2d 193
(Tex. Crim. App. 1985) (en banc) 6
Moore v. State,
No. 74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004) (en banc) 7

Moore v. Texas,
474 U.S. 1113 (1986) 6
Moore v. Texas,
543 U.S. 931 (2004) 7
Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 51
Oats v. State,
181 So. 3d 457 (Fla. 2015) (per curiam) 25
Ortiz v. United States,
664 F.3d 1151 (8th Cir. 2011) 47
Pruitt v. Neal,
788 F.3d 248 (7th Cir. 2015) 31
Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989) 36
Rondon v. State,
711 N.E.2d 506 (Ind. 1999) 22
Roper v. Simmons,
543 U.S. 551 (2005) 25
Sasser v. Norris,
553 F.3d 1121 (8th Cir. 2009) 22
Smith v. Duckworth,
No. 14-6201, 2016 WL 3163056 (10th Cir. June 6, 2016) 24
Smith v. Ryan,
813 F.3d 1175 (9th Cir. 2016) 31
State v. Agee,
364 P.3d 971 (Or. 2015) 25, 26, 37
State v. Smith,
893 S.W.2d 908 (Tenn. 1994) 22
United States v. Candelario–Santana,
916 F. Supp. 2d 191 (D.P.R. 2013) 8

Van Tran v. Colson,
764 F.3d 594 (6th Cir. 2014) 24
Walker v. True,
399 F.3d 315 (4th Cir. 2005) 32
Williams v. Stephens,
761 F.3d 561 (5th Cir. 2014) 55
Wood v. Milyard,
132 S. Ct. 1826 (2012) 22

Constitutional provisions and statutes:

U.S. Const. amend. VIII 16, 17, 19, 25
2001 Fla. Laws ch. 2001-202 (C.S.S.B. 238) 24, 26
Fla. Stat. § 921.137(1) 24, 26
Ind. Code §§ 35-36-9-2 through 35-36-9-6 22
La. Code Crim. Proc. art. 905.5.1(H) 25
N.C. Gen. Stat.:
§ 15A-2005(a)(1) 26
§ 15A-2005(a)(2) 26
Tenn. Code § 39-13-203 22
Tex. Health & Safety Code:
§ 591.003(7-a) 13, 20, 33
§ 591.003(13) 13, 20, 33

Other authorities:

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ..... *passim*
American Association on Mental Deficiency, *Classification in Mental Retardation* (8th ed. 1983) 24, 35

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 1, 20, 38, 48

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) 21

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., Text Revision 2000) 20

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ..... *passim*

Arc of the United States, *Action Alert: Voice Your Opinion on How Intellectual Disability is Defined* (June 11, 2012) 30, 32

The British Psychological Society, *Response to the American Psychiatric Association:* DSM-5 Development (June 2011) 31

Fla. Staff Analysis, S.B. 238 (Feb. 14, 2001) 24

Letter from Sharon Gomez, President, AAIDD Bd. of Dirs., & Margaret A. Nygren, Exec. Dir. & CEO, AAIDD, to John Oldham, President, APA (May 16, 2012) 29, 30

James C. Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 Current Op. in Psychiatry 260 (2013) 32

Thomas Insel,
Director's Blog: Transforming Diagnosis, National Institute of Mental Health (Apr. 29, 2013)..... 31

INTRODUCTION

Atkins v. Virginia, 536 U.S. 304, 317 (2002), prohibited the execution of persons with intellectual disability, but the Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction'" (citation omitted). Then, *Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014), reaffirmed that the States play a "critical role" and retain "discretion" in crafting an *Atkins* standard. That discretion is not "unfettered," *id.*, and States should "consult the medical community's opinions" so that their standards are "informed" by that community's "diagnostic framework." *Id.* at 1993, 2000. But the Court stopped well short of requiring States to adhere precisely to any particular organization's clinical definition of intellectual disability, explaining that those definitions "do not dictate" the *Atkins* analysis because "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Id.* at 2000.

Texas's standard for *Atkins* claims fully complies with these precedents. The Texas Court of Criminal Appeals (CCA) adopted a clinical definition of intellectual disability cited in *Atkins*—the one found in The American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) ("AAMR 9th"). *Ex parte Briseno*, 135 S.W.3d 1, 7-8 & n.26 (Tex. Crim. App. 2004); *see Atkins*, 536 U.S. at 308 n.3. That definition contains the three settled criteria for intellectual disability recognized by the Court in *Atkins* and *Hall*: significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset during the developmental period. *Id.*; *Hall*, 134 S. Ct. at 1994.

In applying this established three-part test here, the CCA did exactly as *Hall* instructed. The CCA consid-

ered medical experts' views on intellectual disability, including a more recent version of the resource the CCA relied upon in fashioning the three-part test—the 11th edition published by the renamed American Association on Intellectual and Developmental Disabilities (AAIDD).[1] And the CCA consulted the most recent version of the other clinical resource cited in *Hall*: The American Psychiatric Association ("APA"), *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5"). Pet. App. 3a-4a & nn.2-3, 6a-7a & n.5.

Based on that review, the CCA concluded that its existing legal standard "remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 7a (quoting *Hall*, 134 S. Ct. at 2000). This conforms to the practice of 24 States that have not adopted wholesale either the AAIDD 11th's or DSM-5's definition of intellectual disability; in contrast, only four States have adopted either definition in full. *See infra* Part I.A.2; Appendix. Regardless, the CCA consulted those resources in adjudicating petitioner's claim. Pet. App. 64a & n.40, 65a, 73a & n.49, 87a & n.57.

Accordingly, the premise of the question presented, as articulated by petitioner, is fundamentally flawed. The CCA did not "prohibit the use of current medical standards on intellectual disability." Pet. Br. i. Petitioner's true grievance is that he disagrees with the conclusions that the CCA drew from the competing expert evidence. Under any relevant standard, that evidence refutes petitioner's claim of intellectual disability.

---

[1] American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ("AAIDD 11th").

STATEMENT

A. Factual Background

1. Petitioner had a troubled childhood. His father was an abusive alcoholic, Pet. App. 27a, and there was very little supervision at home, Pet. App. 140a. At age eleven, petitioner began sneaking out of the house in the middle of the night to see friends. Pet. App. 49a; 2.CR.705.[2] Lacking guidance, petitioner became attracted to "things on the street." Pet. App. 49a; 2.CR.705.

Petitioner struggled in school and disliked it. Pet. App. 50a. He began skipping school in fourth grade, and by seventh grade almost entirely stopped going. *Id.* Petitioner dropped out of school after ninth grade, at age fifteen or sixteen. Pet. App. 188a.

Petitioner was never diagnosed with an intellectual disability in his youth. The record contains three IQ test scores from petitioner's school years.[3] At age twelve he scored a 77 on the Otis-Lennon Mental Abilities Test (OLMAT); at age thirteen he scored a 57 on the Slosson Intelligence Test for Children (Slosson) and a 78 on the Wechsler Intelligence Scale for Children (WISC). Pet. App. 63a. The WISC was a full-scale, individually administered test described by one of petitioner's experts as "the gold standard." J.A. 116. In contrast, the OLMAT and Slosson were group tests, J.A.

---

[2] All record citations designated "CR" are to the Clerk's Record for the state habeas proceedings. All record citations designated "RR" are to the Reporter's Record for the state habeas proceedings.

[3] Petitioner was also administered the Bender-Gestalt and Goodenough "Draw-a-Man" tests, but they were not IQ tests. J.A. 13, 144.

144, that petitioner's experts criticized, *e.g.*, J.A. 12, 57, 115. The administrator of the WISC observed that petitioner's scores "indicated that perhaps this is a child who has not been taught, but who can learn." Pet. App. 22a. The test administrator recommended that petitioner remain in regular classes with some modifications to address his academic weaknesses. Pet. App. 22a-23a.

Petitioner was permanently kicked out of the house at age fourteen and became part of "street life." Pet. App. 27a-28a. At age thirteen, petitioner began drinking alcohol. Pet. App. 47a. In junior high school, he started taking drugs, and by seventeen, petitioner was regularly abusing drugs and alcohol. Pet. App. 47a; 2.CR.694-95. He financed his drug habit with proceeds from stealing cars, burglarizing houses, and hustling pool. Pet. App. 51a. By age seventeen, petitioner was a four-time felon. Pet. App. 17a, 47a; 2.CR.887. He entered prison in 1977 and was paroled in 1979. 2.CR.887.

2. In April 1980, petitioner and two accomplices agreed to commit a robbery in order to make their car payments. Pet. App. 13a. Petitioner supplied the weapons for the robbery—a .32 caliber pistol and a shotgun—and the three men drove around Houston looking for a target. *Id.* They settled on Birdsall Super Market. *Id.* Donning a wig and sunglasses, and concealing his shotgun in plastic bags, petitioner entered the store with the other two robbers; petitioner approached the courtesy booth, staffed by seventy-year-old James McCarble and Edna Scott. Pet. App. 1a, 14a. Petitioner removed his shotgun from the plastic bags and pointed the weapon at McCarble and Scott. Pet. App. 14a. When Scott screamed that the store was being robbed, petitioner aimed the shotgun at McCarble and shot him in the head, killing him. *Id.*

Petitioner's accomplices were quickly arrested, but petitioner evaded capture. Pet. App. 15a. Authorities apprehended him in Louisiana ten days later, *id.*, after which petitioner made a written confession to the robbery and to killing McCarble, Pet. App. 16a.

B. Judicial Proceedings

1. *Conviction and First Appeal.* At trial, petitioner lied under oath, denying that he signed a confession, robbed the store, or killed McCarble, and asserting that he had been in Louisiana at the time of the robbery. Pet. App. 17a, 27a. The jury convicted petitioner of capital murder, and he was sentenced to death. Pet. App. 17a, 18a.

While petitioner's direct appeal was pending, petitioner filed numerous pro se motions and pleadings with the CCA concerning his desire to participate in the appeal, need for access to the record, growing displeasure with his counsel's representation, and dissatisfaction with the trial court's failure to appoint different counsel or allow petitioner to represent himself. Pet. App. 18a. In October 1983, petitioner filed a pro se mandamus petition seeking dismissal of his appellate counsel and permission to proceed with his appeal pro se. *Id.* In response, the CCA ordered the trial court to conduct a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975). Pet. App. 18a. Petitioner represented himself at the *Faretta* hearing, and he presented five exhibits in support of his request to represent himself on appeal. *Id.* Petitioner also expressed a willingness to accept new counsel, so the trial court appointed new appellate counsel. Pet. App. 19a.

After considering the briefing of both his first and second appointed counsel as well as a pro se brief filed by petitioner, the CCA affirmed the conviction and sen-

tence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985) (en banc). This Court denied certiorari and an application to stay the execution date. *Moore v. Texas*, 474 U.S. 1113 (1986).

2. *First and Second Habeas Proceedings.* Petitioner's first state habeas application was denied by the CCA in 1986. Pet. App. 20a. After he filed a federal habeas petition, the district court stayed the execution and dismissed the petition without prejudice to allow petitioner to pursue an unexhausted claim in state court. *Id.*

Represented by new counsel, petitioner filed his second state habeas application in April 1992, in which he claimed ineffective assistance of trial counsel. Pet. App. 20a-21a. The CCA denied relief. Pet. App. 29a. Petitioner then filed a second federal habeas petition, raising the same claims. *Id.* The district court granted relief on petitioner's penalty-phase ineffective-assistance claim, and the Fifth Circuit ultimately affirmed. Pet. App. 29a-30a.[4]

3. *Penalty-Phase Retrial and Appeal.* At his penalty-phase retrial in 2001, petitioner affirmatively argued that he was *not* intellectually disabled. Pet. App. 42a.

---

[4] The Fifth Circuit initially ruled that the district court had failed to give sufficient deference to the state court fact findings under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Moore v. Johnson*, 194 F.3d 586, 590-91 (5th Cir. 1999). But shortly after that decision, this Court decided *Lindh v. Murphy*, 521 U.S. 320 (1997), which held that AEDPA did not apply to pending claims. After this Court granted, vacated, and remanded petitioner's case to the Fifth Circuit in light of *Lindh*, 521 U.S. 1115 (1997), the Fifth Circuit affirmed the district court's judgment, *Moore v. Johnson*, 194 F.3d at 622.

One of petitioner's experts, Bettina Wright, a clinical social worker, interviewed petitioner for four hours and reviewed his IQ tests and school records. Pet. App. 41a; J.A. 269. Wright concluded that petitioner is "nowhere near" intellectually disabled, as "it is his lack of education" that is to blame for his low performance. Pet. App. 41a; J.A. 269. Petitioner's other expert, Dee Dee Halpin, an educational diagnostician, concluded that petitioner had low-average intellectual functioning and that he "definitely had some ability to learn that wasn't tapped early in his school years." Pet. App. 41a.

Petitioner's counsel thus argued that petitioner "wasn't really [intellectually disabled] at all, he was capable of learning." Pet. App. 42a. Petitioner's troubled childhood explained his learning deficits, his counsel asserted, and petitioner's experience in prison proved that he could "learn and grow and become the kind of person that he could have become had he come from a safe environment." Pet. App. 42a-43a.

Petitioner was again sentenced to death. Pet. App. 43a. The CCA affirmed. *Moore v. State*, No. 74,059, 2004 WL 231323, at *12 (Tex. Crim. App. Jan. 14, 2004) (en banc). This Court denied certiorari. *Moore v. Texas*, 543 U.S. 931 (2004).

4. *Third Habeas Proceeding and* Atkins *Hearing.* In June 2003, with new counsel, petitioner filed his third state habeas application, raising 48 claims for relief, including—for the first time—a claim that he is intellectually disabled. 1.CR.3-228. Petitioner's counsel attached affidavits of Gina Vitale, a social worker, and Richard Garnett, a clinical psychologist—but neither met with petitioner or diagnosed him as intellectually disabled. Pet. App. 44a. The state habeas court allowed petitioner's claim to proceed and granted funding for

petitioner to hire additional mental health experts. Pet. App. 46a, 52a.

In the course of these proceedings, the State released petitioner's prison records, which reflected that petitioner had been administered two IQ tests while in prison. In 1984, petitioner scored a 71 on an abbreviated Wechsler Adult Intelligence Scale-Revised (WAIS-R). Pet. App. 23a & n.16. In 1989, petitioner was given a complete WAIS-R and scored a 74. Pet. App. 24a.

a. At the *Atkins* hearing in January 2014,[5] three experts testified for petitioner: Robert Borda and Shawanda Williams Anderson, both clinical neuropsychologists, plus Stephen Greenspan, a retired professor of educational psychology, Pet. App. 24a, 52a.[6] None of petitioner's experts administered a full-scale IQ test, and only Borda met with petitioner (briefly) for the purpose of assessing intellectual functioning. Greenspan refused to diagnose petitioner, and Anderson examined petitioner only for brain injuries or anomalies. Moreover, their diagnostic approaches conflicted in several respects.

---

[5] The delay between the filing of petitioner's third state habeas application and the *Atkins* hearing is attributable to a number of factors, including petitioner's pro se motions to discontinue the habeas proceeding and waive further appeals, his refusal to participate in a psychological examination ordered by the court, substitution of habeas counsel, and supplemental briefing. Pet. App. 45a-47a.

[6] A federal district court recently found Greenspan to be "completely lacking in credibility," and the court issued a warning about Greenspan to other courts. *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 203-06 (D.P.R. 2013); *see also* J.A. 131-32.

First, Borda, a neuropsychologist who had acknowledged that forensic psychology was not his specialty, J.A. 7, admitted that he did not know much about the case, J.A. 48-49, 57, and conducted only a "very, very brief assessment" of petitioner, J.A. 28. Borda concluded that petitioner was intellectually disabled. J.A. 39. But Borda administered only a "very limited test battery" that included a partial IQ test called the Raven's Colored Progressive Matrices (RCPM), on which petitioner scored an 85. J.A. 15-16; Pet. App. 53a. Borda did not conduct any effort or malingering testing because he assumed that petitioner had a low IQ. J.A. 54. Borda admitted on cross examination that "adaptive skills" were not absent in petitioner, but were "probably below average" for his age. J.A. 47. Borda also adopted a stringent adaptive-functioning standard by directly equating executive functioning to adaptive functioning. J.A. 24-25; *see* Pet. App. 87a n.57.

Second, Greenspan conceded that he had never met or communicated with petitioner, nor had he read the transcripts from petitioner's trials. J.A. 119-20. He therefore refused to diagnose petitioner as intellectually disabled. J.A. 120. Regarding the IQ tests petitioner had been administered, Greenspan described the Slosson test as "not the greatest test. It's more of a screening test," J.A. 115, and also stated that the OLMAT is a group test that "should not be given a lot of weight." 2.RR.192. In contrast, Greenspan described the WISC test, on which petitioner scored a 78, as the "gold standard. It's the test that's most wildly [*sic*] given by psychologists and neuropsychologists and it's the one that's most relied upon in high stakes settings such as a court case." J.A. 116.

Much of Greenspan's testimony was in tension with Borda's. Contrary to Borda's dismissal of conducting effort testing regarding IQ scores,[7] Greenspan testified that effort testing is recommended in forensic psychology. Pet. App. 68a-69a; 3.RR.45. Greenspan also disagreed with Borda's equation of executive functioning with adaptive functioning. J.A. 121. And Greenspan criticized the mental-age concept relied upon by Borda. J.A. 116; 2.RR.196.

Third, Anderson testified that she had originally been retained to determine whether petitioner suffered from a brain anomaly or traumatic brain injury, and she met with petitioner for that purpose but not to determine intellectual disability. J.A. 91-92. Anderson did not administer an IQ test. J.A. 90. Only after Anderson met with petitioner did she evaluate the data for intellectual disability (at the request of counsel) and concluded that petitioner "more likely than not" met the criteria. J.A. 73, 89. Like Greenspan, Anderson apparently disagreed with Borda's equation of executive functioning with adaptive functioning. J.A. 85.

b. Unlike petitioner's experts, the State's expert, Kristi Compton, specialized in forensic psychology. 3.RR.83-84. She had served as an expert in over 70 cases and performed over 3,000 forensic evaluations, primarily for defendants and courts. J.A. 134-35, 224-28. Compton met with petitioner for six hours to assess intellectual disability, at which time she administered a battery of tests, including a full-scale IQ test. J.A. 142,

---

[7] "Effort testing" refers to assessments to determine if a person used normal effort, as opposed to purposely using less effort, on a test so that the results are a "true representation of this person's ability." J.A. 141.

Pet. App. 53a. Based on her full review of petitioner's records and her lengthy personal assessment of him, Compton determined that petitioner's intellectual functioning was in the borderline range and there were insufficient adaptive deficits to diagnose petitioner as intellectually disabled. J.A. 185, 186.

Compton administered the Wechsler Adult Intelligence Scale, Fourth Edition IQ test (WAIS-IV), which Compton described as the most current test. J.A. 142. Her assessment included effort testing. J.A. 140-42. Petitioner scored a 57 (54, adjusted for the "Flynn Effect," *see infra* p.31). J.A. 154. Compton was surprised by this outlier score, which she expected to be higher given her observations along with petitioner's history and education level. J.A. 154. Based on "discrepancies throughout the test that [she] saw that indicated suboptimal performance in addition to the effort testing that was conducted," J.A. 154, Compton concluded that petitioner's result was not a valid score, J.A. 203.

Compton testified that the WISC at age thirteen (on which petitioner scored a 78) deserved greater weight because it was the only full-scale standardized test administered in the development period. J.A. 143-44. Like Greenspan, Compton criticized the other two IQ tests given to petitioner in his youth—the Slosson and OLMAT—as group tests without high validity. J.A. 144. Regarding the IQ tests administered while petitioner was incarcerated, Compton explained that depression commonly reduces IQ scores and that there was no effort testing to avoid malingering. J.A. 145-46.

Addressing the evidence of petitioner's adaptive functioning prior to his arrest, Compton testified that while he had academic limitations and adaptive deficits in social interaction, he also lived on the streets, played

pool for money, and mowed lawns, which required adaptive behavior, such as the "ability to understand money concepts and work." J.A. 146. Compton also found it significant that petitioner's experts from his penalty-phase retrial, Halpin and Wright, attributed his withdrawn behavior as a child to emotional problems—not intellectual disability—and that his adaptive functioning improved since going to prison. J.A. 184. Compton further testified that petitioner's behavior during the crime—"[w]earing the wig, covering up the gun[,] and going to Louisiana"—indicated abstract thought. J.A. 147. Petitioner's conduct in the course of his judicial proceedings, including representing himself pro se, further indicated adaptive skills. J.A. 147-48, 182-83. And petitioner's prison records also indicated adaptive skills, including social skills, according to Compton. J.A. 160-62, 168-69.[8]

c. The state habeas trial court adopted wholesale petitioner's proposed findings of fact and conclusions of law, which addressed only his *Atkins* claim, and recommended that the CCA grant habeas relief. Pet. App. 2a-4a. The court did not address petitioner's second and third claims, and it recommended that relief be denied on his remaining 45 claims. Pet. App. 4a-5a.

5. *The Court of Criminal Appeals' Opinion.*

a. Acting as ultimate fact finder, the CCA engaged in a detailed examination of the evidence, carefully con-

---

[8] In addition to reviewing petitioner's records, Compton also personally administered a functional living skills test to assess petitioner's adaptive functioning. J.A. 155-56. Petitioner scored 2.5 standard deviations below the mean, but Compton determined that the score was "not an accurate reflection of his abilities" because she had to give him zeros for two areas in which he lacked exposure (check writing and microwave use). J.A. 155-56.

sidered the testimony and the credibility of the experts, and denied petitioner's *Atkins* claim (along with his other 47 claims). Pet. App. 62a-93a.

The CCA began by addressing Texas's legal standard for *Atkins* claims. The CCA explained that petitioner had to show by a preponderance of the evidence that:

> (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an [IQ] of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen.

Pet. App 5a-6a. This three-part definition for intellectual disability in Texas, originally adopted in *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), incorporates two similar definitions found in the AAMR 9th and the Texas Health and Safety Code.[9] Pet. App. 5a.

Petitioner incorrectly asserts that the CCA "prohibit[ed] consideration of the medical community's *current* 'diagnostic framework.'" Pet. Br. 24. The CCA quoted this Court's holding in *Hall* and expressly examined the APA's and AAIDD's most recent intellectual-disability definitions—in the DSM-5 and AAIDD 11th, respectively—to determine whether Texas's legal standard "remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 3a-4a n.2 (DSM-5), 4a n.3 (AAIDD 11th), 7a (quoting *Hall*, 134 S. Ct. at 2000), 7a n.5. The court observed that Texas's standard "re-

---

[9] Tex. Health & Safety Code § 591.003(7-a) (formerly codified at *id.* § 591.003(13)) (governing state services for persons with intellectual disabilities).

mains generally consistent" with the AAIDD 11th. Pet. App. 7a n.5. The court acknowledged that the AAIDD had dropped the requirement that adaptive deficits be "related" to intellectual deficits, but it noted that Texas's standard remains "consistent with the APA's current position on the issue" because the DSM-5 added this relatedness requirement. Pet. App. 7a n.5.

Turning to the first element of the three-part definition—significantly subaverage general intellectual functioning—the CCA conducted a detailed analysis of petitioner's IQ tests and the related expert testimony. Pet App. 63a-75a. Based on the expert testimony and relying largely upon Compton's thorough analysis, the CCA concluded that the record supported consideration of only petitioner's "78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989." Pet. App. 73a. Applying a five-point standard error of measurement (SEM), the court concluded that petitioner's IQ score on the WISC ranged from 73-83. Pet. App. 74a. Considering evidence that might place his score at the higher or lower end of that range, the court concluded that there was no reason to think petitioner's score of 78 was inaccurate or an unfair representation of his intellectual functioning during the developmental stage. *Id.* The CCA further concluded that petitioner's results on the 1989 WAIS-R confirmed the accuracy of his 1973 WISC score. Pet. App. 74a-75a.

The CCA proceeded to consider the second prong of the intellectual-disability standard—significant and related limitations in adaptive functioning—and concluded that petitioner again failed to meet his burden. Pet. App. 75a. After carefully reviewing the expert testimony, *see* Pet. App. 75a-85a, the court found "Compton's opinion far more credible and reliable than those of ap-

plicant's experts who testified at the 2014 evidentiary hearing," Pet. App. 85a. The CCA alternatively held that even if petitioner's adaptive deficits had satisfied the standard, he still failed to show the necessary link between such adaptive deficits and intellectual-functioning deficits. Pet. App. 88a-89a. The court added that its conclusion on this "relatedness" inquiry was also supported by the optional "*Briseno* evidentiary factors," which are not part of Texas's three-part definition of intellectual disability. Pet. App. 89a; *see infra* Part III.

b. Judge Alcala dissented. Pet. App. 94a-126a. The dissent argued that the court "must consult the medical community's current views and standards," Pet. App. 104a, but did not grapple with the fact that the majority had cited and considered the APA's and AAIDD's current definitions of intellectual disability before concluding that the existing standard remained valid, *see* Pet. App. 6a-7a.

With respect to the intellectual-functioning prong, the dissent faulted the court for using "a strict cutoff based on IQ scores" in rejecting petitioner's claim, Pet. App. 107a, but such a holding appears nowhere in the court's opinion, *see* Pet. App. 74a-75a. The dissent also accused the CCA of cherry-picking petitioner's highest IQ scores and disregarding the others. Pet. App. 108a. But the substance of this criticism was that the dissent would have weighed the competing expert evidence differently. Pet. App. 108a-110a.

Addressing the adaptive-functioning prong, the dissent chided the CCA for not giving enough weight to adaptive deficits, in accord with the DSM-5. Pet. App. 112a. But the majority's determination regarding adaptive deficits expressly relied upon the expert testimony

of Compton, who placed a greater emphasis on adaptive functioning than on intellectual functioning. *See* J.A. 136, 185-86.

Finally, the dissent criticized *Briseno*'s reference to the character "Lennie" from John Steinbeck's novel *Of Mice and Men*. Pet. App. 116a-118a. But the dissent did not claim that the CCA here relied on, or even made reference to, that remark. The dissent also criticized *Briseno*'s optional evidentiary factors. Pet. App. 119a.

SUMMARY OF ARGUMENT

I. A. Petitioner's articulation of the question presented rests on a false premise. The CCA did not "prohibit the use of current medical standards on intellectual disability." Pet. Br. i. The CCA actually considered the clinical definitions that petitioner labels "current medical standards"—the DSM-5 and AAIDD 11th—and relied on them to apply certain concepts. What the CCA did not do is adopt those definitions wholesale as Texas's legal standard for *Atkins* claims.

Neither the Eighth Amendment nor this Court's decisions in *Atkins* and *Hall* require States to adhere precisely to a particular organization's clinical definition of intellectual disability. *Atkins* gave States latitude to develop substantive standards implementing the prohibition on executing persons with intellectual disability. 536 U.S. at 317. *Hall* explained that States must consider the views of medical experts so that their *Atkins* standards are "informed by the medical community's diagnostic framework." 134 S. Ct. at 2000. But neither case directed States to strictly follow a particular clinical definition of intellectual disability. To the contrary, the Court confirmed in *Hall* that those definitions "do not dictate" the *Atkins* analysis, and

"[t]he legal definition of intellectual disability is distinct from a medical diagnosis." *Id.*

Since *Hall* was decided, no consensus has developed among the States that resolution of *Atkins* claims requires application of the APA's or AAIDD's latest clinical definitions. *See* Appendix. To the contrary, only four States that impose the death penalty have adopted either the DSM-5 or the AAIDD 11th as their substantive *Atkins* standards. By contrast, 24 States—including Texas—still employ a definition modeled on the established three-prong test contained in previous versions of those texts.

In any event, requiring States to adhere precisely to the latest APA or AAIDD clinicial definitions would be both unworkable and unwarranted. The DSM-5 acknowledges that there is an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5 at 25. More problematic, the DSM-5 and AAIDD 11th definitions differ in many important respects, creating a dilemma as to which definition would count as the requisite "current medical standard." The AAIDD itself considered those inconsistencies "disastrous," warning that they "would create havoc in the . . . courts (especially in death penalty cases)." *See infra* Part I.A.3.

Texas's *Atkins* standard thus comports with Eighth Amendment requirements. This test tracks the long-settled three-part test for intellectual disability that the Court recognized in *Atkins*. It does not use a strict IQ score cutoff or ignore the SEM, which were the defects invalidated in *Hall*. Rather, the CCA applied Texas's standard here just as *Hall* contemplates: it considered the most recent clinical definitions, consulted them when necessary, and determined that the Texas defini-

tion of intellectual disability "remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 7a (quoting *Hall*, 134 S. Ct. at 2000).

B. Petitioner's *Atkins* claim fails under any relevant standard. Here, the State's expert was the only forensic psychologist to examine him and the only expert to administer a full-scale standardized test for intellectual functioning, and she concluded that he does not have intellectual disability. The CCA reasonably relied on that clinical assessment, as well as the considerable record evidence, in holding that petitioner failed to meet his burden to show either significantly subaverage general intellectual functioning or significant and related deficits in adaptive functioning.

II. Even if the Court were to conclude that the CCA did not sufficiently consider the DSM-5 or AAIDD 11th in applying Texas's *Atkins* standard to petitioner, it should not impose part or all of those definitions on the States as a national standard. Instead, the appropriate remedy would be to remand this case so that the CCA may give those definitions whatever additional consideration is due and further explain how those definitions inform Texas's standard.

III. Petitioner incorrectly contends that the "*Briseno* evidentiary factors" represent Texas's rejection of current medical standards. The CCA has made clear that these additional factors are not part of its three-prong intellectual-disability definition and are entirely optional. And in this case, the factors were not relevant to the outcome. Regardless, each factor may be traced to considerations that this Court has identified as relevant to the *Atkins* analysis.

ARGUMENT

I. The Court of Criminal Appeals Correctly Denied Petitioner's *Atkins* Claim.

Texas's legal standard for determining whether a capital offender has intellectual disability, and the CCA's application of that standard to petitioner, comply with the Eighth Amendment and this Court's decisions in *Atkins* and *Hall*.

A. Texas's Definition of Intellectual Disability Properly Implements *Atkins*.

Atkins did not adopt a national standard defining intellectual disability for Eighth Amendment purposes. To the contrary, the Court observed that "[t]o the extent there is serious disagreement" among the States about the execution of persons with intellectual disability, it is "in determining which offenders are in fact [persons with intellectual disability]," and that not all persons who claim to have intellectual disability "will be so impaired as to fall within the range of . . . offenders [with intellectual disability] about whom there is a national consensus." 536 U.S. at 317. Accordingly, the Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

The CCA undertook that task for Texas in *Briseno*. There the court held that it would follow two similar definitions of intellectual disability that it had employed before *Atkins* in the context of considering the mitigating effect of intellectual disability in capital sentencing. 135 S.W.3d at 7-8 & n.23 (citing *Ex parte Tennard*, 960 S.W.2d 57, 60-61 (Tex. Crim. App. 1997) (en banc)).

The first definition was one of the clinical definitions cited in *Atkins* itself: the AAMR 9th. *Id.* at 7; *see Atkins*, 536 U.S. at 308 n.3. The AAMR 9th described intellectual disability as characterized by "(1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Briseno*, 135 S.W.3d at 7 & n.26 (quoting AAMR 9th at 5) (footnotes omitted). The second definition, which appears in a Texas social-services statute, similarly defines intellectual disability to mean "'significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.'" *Id.* at 7 & n.27 (quoting Tex. Health & Safety Code § 591.003(13) (now recodified at § 591.003(7-a))). The court also noted that the APA had defined "[s]ignificantly subaverage intellectual functioning" to mean "'an IQ of about 70 or below (approximately 2 standard deviations below the mean)'"—another clinical definition cited in *Atkins*. *Id.* at 7 n.24 (quoting APA, *Diagnostic and Statistical Manual of Mental Disorders* 39 (4th ed., Text Revision 2000) ("DSM-IV-TR")); *see Atkins*, 536 U.S. at 308 n.3.

The CCA applied the three-part test contained in the AAMR 9th, along with the DSM-IV-TR definition of significantly subaverage intellectual functioning, and rejected petitioner's *Atkins* claim. Pet. App. 5a, 63a-89a. Petitioner contends that the CCA erred because Texas's three-part test embodies "superseded medical standards," and by continuing to apply it today, the CCA "prohibits" the use of "current medical standards." Pet. Br. 27-31. In petitioner's view, those current standards are found in the most recent clinical defini-

tions adopted by the APA (in the DSM-5) and the AAIDD (in the AAIDD 11th). Pet. Br. 29-30.

But the Court has never required States to adopt particular clinical definitions or diagnostic criteria to implement *Atkins*. Moreover, any such requirement would be both unworkable and unwarranted. Petitioner's two preferred clinical definitions do not align with each other, much less represent a general consensus among the States or even the medical community.

1. *Atkins* and *Hall* do not require States to adopt wholesale the latest intellectual-disability definitions published by select professional groups.

The States' "task" in implementing *Atkins* is not confined to adopting wholesale the latest clinical definition of intellectual disability published by a particular organization. *Cf.* Pet. Br. 29-31. Rather, *Atkins* gave States latitude to define intellectual disability in their respective laws within certain limits.

The Court has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997). Consequently, "[l]egal definitions, . . . which must 'take into account such issues as individual responsibility . . . and competency,' need not mirror those advanced by the medical profession." *Id.* (quoting APA, *Diagnostic and Statistical Manual of Mental Disorders* xxiii, xxvii (4th ed. 1994) ("DSM-IV")).

The Court's precedents on intellectual disability follow this tradition. *Atkins* acknowledged that "serious disagreement" remained in determining which offenders have intellectual disability, and that the national consensus that formed the cornerstone of *Atkins*'s rule

existed only as to a "range" of offenders. 536 U.S. at 317. The Court also noted that the States' definitions of intellectual disability were "not identical" and only "generally conform[ed]" to the clinical definitions. *Id.* at 317 n.22.

Indeed, at the time *Atkins* was decided, two States that the Court cited as part of the national consensus—Indiana and Tennessee—had expressly refused to adopt clinical definitions. *Compare id.* at 314 n.12 (citing Tenn. Code Ann. § 39-13-203 and Ind. Code §§ 35-36-9-2 through 35-36-9-6), *with Rondon v. State*, 711 N.E.2d 506, 516 n.14 (Ind. 1999) ("We do not adopt the DSM–IV's definition of adaptive functioning as the definition of adaptive behavior."), *and State v. Smith*, 893 S.W.2d 908, 917 (Tenn. 1994) (declining to adopt the AAMR's definition of "deficits in adaptive behavior").

The Court later confirmed that *Atkins* "did not provide definitive procedural or *substantive* guides for determining when a person who claims [intellectual disability] 'will be so impaired as to fall [within *Atkins*'s compass].'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*, 536 U.S. at 317) (emphasis added). Circuit courts have likewise acknowledged that *Atkins* does not install any particular clinical definition as the legal standard.[10]

Hall did not displace or diminish the States' role in substantively defining intellectual disability for *Atkins* purposes, as petitioner contends. *See* Pet. Br. 29-31. Ra-

---

[10] *See, e.g., Hooks v. Workman*, 689 F.3d 1148, 1172 (10th Cir. 2012); *Chester v. Thaler*, 666 F.3d 340, 347 (5th Cir. 2011); *Hill v. Humphrey*, 662 F.3d 1335, 1351-52 (11th Cir. 2011) (en banc); *Sasser v. Norris*, 553 F.3d 1121, 1125 n.3 (8th Cir. 2009), *abrogated on other grounds by Wood v. Milyard*, 132 S. Ct. 1826 (2012); *Larry v. Branker*, 552 F.3d 356, 369 (4th Cir. 2009).

ther, the Court reaffirmed the States' "critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed." 134 S. Ct. at 1998.

To be sure, *Hall* described clinical definitions as "a fundamental *premise* of *Atkins*," and it clarified that "*Atkins* did not give the States *unfettered* discretion to define the full scope of the constitutional protection" or "*complete* autonomy to define intellectual disability as they wished." *Id.* at 1998, 1999 (emphases added). But those qualifiers prove that petitioner's argument cannot be correct. If States were required to adhere strictly to the APA's and AAIDD's latest clinical definitions, they would have *no* discretion or autonomy in defining intellectual disability.

Hall describes a more limited function for clinical definitions than petitioner suggests. The Court emphasized that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis" and "the views of medical experts . . . do not dictate" whether a particular intellectual-disability standard is valid. *Id.* at 2000. Instead, in exercising its "independent judgment" to evaluate a State's standard, the Court's analysis is "*informed* by the medical community's diagnostic framework." *Id.* (emphasis added); *see id.* ("'[T]he science of psychiatry . . . informs but does not control ultimate legal determinations . . . [.]'") (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002)). To that end, it is proper to "consider" and "consult" professional studies and opinions in assessing whether a State's definition of intellectual disability appropriately implements *Atkins*. *Id.* at 1993.

The "consideration" and "consultation" required by *Hall* is not a mandate to adopt wholesale the APA's or AAIDD's most recent definition of "intellectual disability." *Hall* itself makes that clear. Florida's statutory definition, at issue in *Hall*, was adopted in 2001, 2001 Fla. Laws ch. 2001-202 (C.S.S.B. 238) (codified at Fla. Stat. § 921.137(1)), and appears to have been modeled on the *1983* version of the AAIDD's definition.[11] Yet the Court held that "[o]n its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Hall*, 134 S. Ct. at 1994. Florida's *application* of the statute was unconstitutional, however, because it imposed a strict IQ cutoff of 70 and failed to account for the standard error of measurement in IQ scores (SEM). *Id.* at 2001. Those practices did not merely depart from current clinical standards, but also ran "counter to the clinical definition *cited throughout Atkins*," which "have *long included* the SEM." *Id.* at 1999 (emphases added).[12]

---

[11] *See* American Association on Mental Deficiency, *Classification in Mental Retardation* 1 (8th ed. 1983) ("AAMD 8th") (defining "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period," a period further defined as "period of time between conception and the 18th birthday"). The DSM-IV is also cited in the definition's legislative history. Fla. Staff Analysis, S.B. 238 (Feb. 14, 2001).

[12] As with *Atkins*, most circuit courts generally have not interpreted *Hall* as requiring strict adherence to clinical definitions of intellectual disability. *See, e.g.*, *Smith v. Duckworth*, No. 14-6201, 2016 WL 3163056, at *8 (10th Cir. June 6, 2016); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 637 (11th Cir. 2016); *Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014); *but see Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014).

2. No national consensus requires wholesale use of a particular organization's latest clinical definition.

Not only has the Court never required States to adopt or adhere precisely to the APA's or AAIDD's latest clinical definition of intellectual disability for *Atkins* purposes, but there is presently no national consensus embracing such an approach. Only four States have adopted either the APA's or AAIDD's latest clinical definition wholesale, while 24 States that have the death penalty continue to use an earlier articulation of the test like Texas. This "essential instruction" from the States, *Roper v. Simmons*, 543 U.S. 551, 564 (2005), weighs heavily against petitioner's claim that the Eighth Amendment requires every State to conform its legal standard to those particular definitions.

Only four States have adopted the DSM-5 or AAIDD 11th clinical standards wholesale as their legal definition of intellectual disability for *Atkins* claims. La. Code Crim. Proc. art. 905.5.1(H) (DSM-5); *Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015) (en banc) (DSM-5 and AAIDD 11th); *State v. Agee*, 364 P.3d 971, 990 (Or. 2015) (DSM-5); *Commonwealth v. Bracey*, 117 A.3d 270, 273 (Pa. 2015) (approving AAIDD 11th as alternative to DSM-IV-TR).[13] And of those four, only Oregon did so

---

[13] Petitioner incorrectly counts Florida as a State whose high court has "held that current medical standards should be considered in resolving *Atkins* claims." Pet. Br. 48 & n. 25 (citing *Oats v. State*, 181 So. 3d 457, 467-68 (Fla. 2015) (per curiam)). In *Oats*, the court explained that "the Supreme Court has now stated that courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive." 181 So. 3d at 467 (citing *Hall*, 134 S. Ct. at 2001). That is, the court adopted that standard specifically because it believed

for the reason advanced by petitioner—"that current medical standards should be considered in resolving *Atkins* claims," Pet. Br. 48. *See Agee*, 364 P.3d at 989-90.

By contrast, the Mississippi and Pennsylvania high courts adopted the most recent definitions only after determining that they did not effect a substantive change. *Chase*, 171 So. 3d at 471 ("The new definitions have not materially altered the diagnosis of intellectual disability but have provided new terminology."); *Bracey*, 117 A.3d at 273 n.4 ("As there is no substantive change to the definition of intellectual disability between the AAIDD and AAMR Manuals, we approve of the AAIDD Manual's definition." (citation omitted)). Notably, the Pennsylvania Supreme Court took the opposite approach from the Oregon Supreme Court regarding the DSM-5: it refused to apply the DSM-5 definition to an *Atkins* claim, or remand for a new hearing under that standard, because the DSM-5 had not been published at the time of the original *Atkins* hearing—even though the court believed that the DSM-5 had

---

Hall requires it, not because that is the "current medical standard." Florida's substantive definition of intellectual disability has remained unchanged since 2001. Fla. Stat. § 921.137(1) (codifying 2001 Fla. Laws ch. 2001-202 (C.S.S.B. 238)).

North Carolina now mandates application of "[a]ccepted clinical standards" in "diagnosing significant limitations in intellectual functioning and adaptive behavior," N.C. Gen. Stat. § 15A-2005(a)(2), but the statute neither incorporates nor mirrors the DSM-5 or AAIDD 11th definitions. Rather, it still requires "significantly subaverage general intellectual functioning" and defines "significant limitations in adaptive functioning" as "[s]ignificant limitations in two or more . . . adaptive skill areas," *id.* § 15A-2005(a)(1), contrary to the DSM-5 and AAIDD 11th.

since "altered the DSM–IV's definition of adaptive functioning." *Bracey*, 117 A.3d at 273 & n.4.

In contrast to those four States, 24 of the States that have the death penalty employ definitions similar to Texas's both in their wording and in their apparent reference to older versions of the DSM or AAIDD formulations. *See* Appendix. In addition, while Pennsylvania has embraced the AAIDD 11th as one alternative definition, it has retained the DSM-IV definition as the other option—even after publication of the DSM-5. *Commonwealth v. Hackett*, 99 A.3d 11, 26-27 (Pa. 2014).[14]

Given that only four of the thirty States that impose the death penalty have adopted or required wholesale use of either the DSM-5 or the AAIDD 11th intellectual-disability definitions, and only one has done so in the name of following "current standards," there is nothing close to a national consensus that States must adopt either definition as the legal standard for *Atkins* claims.

3. Requiring States to strictly adhere to either the APA's or AAIDD's latest clinical definition would be unworkable and unwarranted.

As in *Atkins*, the Court's "independent evaluation of the issue" should "reveal[] no reason to disagree with the judgment" of the States. 536 U.S. at 321. A rule requiring States to strictly follow the APA's or AAIDD's latest clinical definition for *Atkins* purposes would be both unworkable and unwarranted.

---

[14] Montana and New Hampshire have not defined intellectual disability specifically for *Atkins* purposes. New Hampshire's statutory definition for social services tracks the AAMD 8th definition. *See* Appendix.

The DSM-5 itself acknowledges that there is an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5 at 25. This Court has relied on and quoted identical language from previous DSM versions for this same proposition. *See Clark v. Arizona*, 548 U.S. 735, 775-76 (2006) (DSM-IV-TR); *Crane*, 534 U.S. at 413-14 (DSM-IV). Accordingly, the DSM-5 cautions that "[i]n most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability . . . does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g. . . . disability)." DSM-5 at 25. The DSM-5's own "imperfect fit" disclaimer undermines petitioner's claim that States must strictly follow any published clinical definition of intellectual disability for *Atkins* claims.

Forcing the States to adopt a particular organization's latest clinical definition would create a dilemma, in any event, because the organizations' latest clinical definitions differ in many important aspects. Petitioner's preferred definitions—those found in the DSM-5 and the AAIDD 11th—differ in both terminology and substance:

- The DSM-5 provides that "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be *directly related* to the intellectual impairments described in Criterion A [intellectual functioning]." DSM-5 at 38 (emphasis added). The AAIDD 11th omits the relatedness requirement (which had appeared in the AAMR 9th).

- The AAIDD 11th provides that "significant limitations in adaptive behavior should be established through the use of standardized measures" and is "operationally defined as performance that is approximately two standard deviations below the mean." AAIDD 11th at 43. The DSM-5 does not set any performance threshold for standardized testing of adaptive functioning. *See* DSM-5 at 37-38.
- The AAIDD 11th requires intellectual disability to "originate[] before age 18." AAIDD 11th at 1. The DSM-5 requires onset of intellectual and adaptive deficits during the "developmental period." DSM-5 at 33.

Petitioner and some amici now attempt to downplay the differences between the definitions. *E.g.*, Pet. Br. 44 n.22; American Psychological Association Amicus Br. 7 n.3. But the AAIDD itself considered those inconsistencies "***disastrous from a public policy and service eligibility perspective***" when it commented on the final draft of the APA's DSM-5.[15] In particular, the AAIDD recommended that the DSM-5 definition be in "direct alignment" with the AAIDD 11th, because "[h]aving the two most authoritative manuals in the country defining 'intellectual disability' using different terminology and different definitions would create havoc in the . . . courts (especially in death penalty cases)." AAIDD May

---

[15] Letter from Sharon Gomez, President, AAIDD Bd. of Dirs., & Margaret A. Nygren, Exec. Dir. & CEO, AAIDD, to John Oldham, President, APA, at 3 (May 16, 2012), https://aaidd.org/docs/default-source/comments/aaidd-dsm5-comment-letter.pdf?s fvrsn=2 ("AAIDD May 2012 Letter") (emphasis in original).

2012 Letter, at 2. Petitioner's amicus The Arc of the United States shared that concern, urging that differences between the APA's and AAIDD's definitions "would cause significant confusion in . . . the courts."[16] Nonetheless, the published DSM-5 definition is not in "direct alignment" with the AAIDD 11th.

The AAIDD directed more pointed criticisms at the DSM-5 diagnostic criteria. For example, the AAIDD complained that the draft adaptive-deficit criterion was "neither consistent with either the AAIDD position nor with current psychometric literature." AAIDD May 2012 Letter, at 3. To that end, the AAIDD recommended that the DSM-5 be modified so that "a significant limitation in adaptive behavior is defined as deficits of approximately 2 or more standard deviations below the population mean in one or more aspects of adaptive behavior." *Id.* As noted above, the APA did not adopt that definition. Also, the AAIDD urged that the age of onset be changed to 18 years because the DSM-5's "lack of specificity in defining the end of the developmental period is fraught with potential for inconsistency in interpretation and application, and is inconsistent with the AAIDD position." *Id.* at 4; *accord* Arc 2012 Action Alert (explaining that the DSM-5's lack of a specific age of onset "will cause confusion and result in inconsistent use of developmental periods across states and jurisdictions"). That recommendation was also rejected.

The AAIDD's criticisms of the DSM-5 definition of intellectual disability are emblematic of the lack of con-

---

[16] The Arc of the United States, *Action Alert: Voice Your Opinion on How Intellectual Disability is Defined* (June 11, 2012), http://www.thearcofshelby.org/news/?newsID=82 ("Arc 2012 Action Alert").

sensus within the medical community. In April 2013, the National Institute of Mental Health (NIMH) announced that "NIMH will be re-orienting its research away from DSM categories."[17] And the British Psychological Society criticized the DSM-5's reliance on "social norms" and "subjective judgments."[18]

The lack of medical consensus extends to the so-called "Flynn Effect." The DSM-5 officially recognizes that an IQ test score may be inflated by the "Flynn Effect," an observed rise in test scores over time "due to out-of-date test norms." DSM-5 at 37. Likewise, the AAIDD 11th provides that "best practices require recognition of a potential Flynn Effect" and recommends correcting IQ scores on older tests. AAIDD 11th at 37. Yet scholars continue to express "competing views" on this issue, *Ledford*, 818 F.3d at 638, and "it is not common practice to adjust IQ scores by a specific amount to account for the phenomenon," *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015). In fact, a circuit split has arisen on whether, and how, to address the Flynn Effect.[19]

---

[17] Thomas Insel, *Director's Blog: Transforming Diagnosis*, National Institute of Mental Health (Apr. 29, 2013), http://www.nimh.nih.gov/about/director/2013/transforming-diagnosis.shtml.

[18] The British Psychological Society, *Response to the American Psychiatric Association:* DSM-5 Development 2 (June 2011), http://apps.bps.org.uk/_publicationfiles/consultation-responses/DSM-5%202011%20-%20BPS%20response.pdf.

[19] *Compare Smith v. Ryan*, 813 F.3d 1175, 1185 & n.14 (9th Cir. 2016) (accepting, but not requiring, Flynn Effect evidence); *Ledford*, 818 F.3d at 640 (the Flynn Effect may be considered, but adjusting scores is not required); *Pruitt v. Neal*, 788 F.3d 248, 267 & n.2 (7th Cir. 2015) (the Flynn Effect need not be accepted and applied); *Hooks*, 689 F.3d at 1170 (adjusting scores for the

Similarly, the medical community criticized the DSM-5's lack of field testing. The DSM-5 neurodevelopmental workgroup used "literature review and expert opinion to reach consensus" on the revised intellectual disability diagnosis, but "[n]o field trials were conducted."[20] The Arc of the United States strongly opposed that decision, asserting that changes to the diagnostic criteria should not have been made "without first assessing the feasibility, clinical utility, reliability, and validity of the draft criteria." Arc 2012 Action Alert.

In sum, given the "imperfect fit" between clinical diagnoses and legal determinations, the disparities between the APA's and AAIDD's intellectual-disability definitions, and the divergent views in the medical community about those definitions' validity and reliability, the Court should not expand the role of the APA and AAIDD manuals in the *Atkins* analysis beyond what *Hall* already provides. It is proper for courts to "consult" and "consider" those resources, but they "do not dictate" the "legal determination of intellectual disability." *Hall*, 134 S. Ct. at 1993, 2000. Indeed, "it is precisely where such disagreement exists" among medical professionals "that legislatures have been afforded the widest latitude." *Hendricks*, 521 U.S. at 360 n.3.

Flynn Effect is not required); *Gray v. Epps*, 616 F.3d 436, 446 n.9 (5th Cir. 2010) (not accepting the Flynn Effect as scientifically valid), *with Black v. Bell*, 664 F.3d 81, 95 (6th Cir. 2011) (the Flynn Effect should be considered); *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (requiring consideration of Flynn Effect evidence).

[20] James C. Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 Current Op. in Psychiatry 260, 260-62 (2013).

4. Texas's definition of intellectual disability satisfies *Atkins* and *Hall*.

a. Texas's intellectual-disability standard for *Atkins* claims satisfies the Eighth Amendment, as the CCA has expressly adopted one of the clinical definitions—the AAMR 9th—cited in *Atkins* itself:

> [Intellectual disability] is a disability characterized by: (1) "significantly subaverage" general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

Briseno, 135 S.W.3d at 7 (quoting AAMR 9th at 5) (footnotes omitted); *see Atkins*, 536 U.S. at 308 n.3. And the Texas statutory definition that the CCA also approved for use in *Atkins* claims describes intellectual disability in very similar terms. *Briseno*, 135 S.W.3d at 7.[21] Moreover, in elaborating on the meaning of "significantly subaverage general intellectual functioning," which appears in both definitions, the CCA quoted the other clinical definition cited in *Atkins*—the DSM-IV-TR—in determining that this prong is "defined as an IQ of about 70 or below." *Id.* at 7 & n.24; *see Atkins*, 536 U.S. at 308 n.3. By selecting these particular criteria, Texas has closely heeded the "substantial guidance" that *Atkins* provides "on the definition of intellectual disability." *Hall*, 134 S. Ct. at 1999.

Since adopting these standards in *Briseno* in 2004, the CCA has applied them to grant relief on numerous

---

[21] Tex. Health & Safety Code § 591.003(13) (now recodified at § 591.003(7-a)) (defining intellectual disability to mean "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period").

Atkins claims.[22] Texas has thus fulfilled its role in "'developing appropriate ways to enforce the constitutional restrictions'" from *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416-17).

b. Nothing in *Hall* calls into doubt Texas's intellectual-disability definition.

Hall identified two constitutional defects in Florida's *Atkins* standard. First, Florida employed a "strict IQ test score cutoff of 70," under which a person with a score above 70 conclusively "does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Hall*, 134 S. Ct. at 1994. Second, when considering IQ scores, Florida failed to account for the SEM, treating the score as "a fixed number" rather than "a range of scores on either side of the recorded score" "within which one may say an individual's true IQ score lies." *Id.* at 1995-96.

Neither defect afflicts Texas's *Atkins* jurisprudence or the CCA's decision here. *See infra* Part I.B.1. First, as this Court recognized in *Hall*, Texas does not have a strict IQ cutoff. *See* 134 S. Ct. at 1996-98 (list of States

---

[22] *See, e.g.*, *Ex parte Martinez*, No. WR–58,358–02, 2016 WL 3457224 (Tex. Crim. App. June 15, 2016); *Ex parte Maldonado*, No. WR–51612–02, 2013 WL 2368771 (Tex. Crim. App. May 22, 2013); *Ex parte Smith*, No. AP-76906, 2012 WL 5450895 (Tex. Crim. App. Nov. 7, 2012); *Ex parte Plata*, No. AP-75820, 2008 WL 151296 (Tex. Crim. App. Jan. 16, 2008); *Ex parte Van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007); *Ex parte Simms*, No. AP-75625, 2007 WL 602814 (Tex. Crim. App. Feb. 28, 2007); *Ex parte DeBlanc*, No. AP-75113, 2005 WL 768441 (Tex. Crim. App. Mar. 16, 2005); *Ex parte Valdez*, 158 S.W.3d 438 (Tex. Crim. App. 2004); *Ex parte Bell*, 152 S.W.3d 103 (Tex. Crim. App. 2004); *Ex parte Modden*, 147 S.W.3d 293 (Tex. Crim. App. 2004).

with impermissible IQ score cutoff did not include Texas); *see also Mays*, 757 F.3d at 218 ("Texas has never adopted the bright-line cutoff at issue in *Hall*."). When the CCA first adopted an intellectual-disability definition in *Briseno*, it expressly recognized that "[p]sychologists and other mental health professionals are flexible in their assessment of [intellectual disability]; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as [having intellectual disability]." 135 S.W.3d at 7 n.24 (citing AAMD 8th at 23); *accord Ex parte Cathey*, 451 S.W.3d 1, 10 (Tex. Crim. App. 2014). To that end, the CCA has held that "[t]he IQ score is not . . . the exclusive measure of [intellectual disability]" and "applicants should be given the opportunity to present clinical assessment to demonstrate why his or her full-scale IQ score is within th[e test's] margin of error." *Ex parte Hearn*, 310 S.W.3d 424, 428, 431 (Tex. Crim. App. 2010).

Second, Texas law accounts for the SEM. The CCA acknowledged in *Briseno* that "IQ tests differ in content and accuracy." 135 S.W.3d at 7 n.24. Accordingly, the CCA accounts for the SEM in assessing IQ scores. *E.g.*, *Cathey*, 451 S.W.3d at 18 ("We agree that, taking the SEM into account, applicant's IQ score range is between 72 and 82."); *Hearn*, 310 S.W.3d at 428 (recognizing that "any score could actually represent a score that is five points higher or five points lower than the actual IQ").

c. Beyond rejecting a strict IQ score cutoff of 70 and requiring consideration of the SEM, *Hall* does not impose any general mandate that States adhere precisely to the latest clinical definitions promulgated by the APA and AAIDD. *See supra* Part I.A.1. Rather, *Hall* instructs States "to *consult* the medical community's

opinions" so that "the legal determination of intellectual disability," while "distinct from a medical diagnosis," is "*informed by* the medical community's diagnostic framework." 134 S. Ct. at 1993, 2000 (emphases added). The CCA complied with that directive here.

The state habeas trial court had departed from the CCA's precedent in recommending that petitioner's *Atkins* claim be granted. It reasoned that, because the CCA had adopted the AAMR 9th definition, the latest edition of that resource—the AAIDD 11th—necessarily provided the governing standard. Pet. App. 149a-150a. That was error, the CCA explained, not because the AAIDD 11th should be entirely disregarded, but for the more fundamental reason that a lower court cannot decide that controlling precedent no longer applies. Pet. App. 6a-7a; *cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (holding that circuit courts should "leav[e] to this Court the prerogative of overruling its own decisions").

Taking up the question of changing standards itself, the CCA did exactly as *Hall* instructed. It acknowledged that, since its 2004 adoption of legal definitions of intellectual disability for *Atkins* claims, the APA and AAIDD had revised their diagnostic manuals. Pet. App. 3a-4a & nn.2-3 (quoting DSM-5 and AAIDD 11th), 6a-7a. But the CCA concluded that those revisions did not warrant a change in Texas's legal standard, reasoning that "the legal test we established in *Briseno* remains adequately 'informed by the medical community's diagnostic framework.'" Pet. App. 7a (quoting *Hall*, 134 S. Ct. at 2000).

To that point, the CCA elaborated that Texas's standard "remains generally consistent with the

AAIDD's current definition." Pet. App. 7a n.5. A comparison of the two definitions confirms that assessment:

> Texas: Intellectual disability is "characterized by: (1) significantly subaverage general intellectual functioning; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Briseno*, 135 S.W.3d at 7 (footnotes and internal quotation marks omitted).
>
> AAIDD 11th: Intellectual disability is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AAIDD 11th at 1.

The AAIDD 11th itself recognizes that these "three criteria" in its current definition "have not changed substantially over the last 50 years," citing as proof a chart that includes the AAMR 9th definition Texas has adopted. *Id.* at 8, 12. Even most courts applying the latest clinical definitions agree, noting that those versions have not materially changed the intellectual-disability standard described in *Atkins*. *See Brumfield v. Cain*, 808 F.3d 1041, 1058 n.25 (5th Cir. 2015) (describing Louisiana's DSM-5-based statute); *Chase*, 171 So. 3d at 471; *Bracey*, 117 A.3d at 273 n.4. *But see Agee*, 364 P.3d at 988.

The CCA also correctly noted that Texas's requirement that adaptive deficits be "related" to intellectual impairments "is consistent with the APA's current position on this issue." Pet. App. 7a n.5, 10a n.9; *see Briseno*, 135 S.W.3d at 7; DSM-5 at 38 (explaining that "the deficits in adaptive functioning must be *directly*

related to the intellectual impairments described in Criterion A" (emphasis added)). Thus, although the AAIDD 11th definition omits that requirement, the CCA chose to retain it. Pet. App. 6a, 7a n.5.

After noting those definitional consistencies, the CCA relied on both the AAIDD 11th and the DSM-5 to explain specific clinical concepts relating to its analysis of petitioner's evidence. Pet. App. 64a & n.40 (citing AAIDD 11th at 38 regarding the "practice effect" on IQ testing); Pet. App. 73a & n.49 (citing AAIDD 11th at 35 to discredit the "mental age" method of deriving IQ scores); Pet. App. 87a & n.57 (citing DSM-5 to clarify "executive-functioning" measures).

Having thus "consider[ed]" various clinical definitions of intellectual disability and "consult[ed]" them where it deemed appropriate, the CCA complied with *Hall*. 134 S. Ct. at 1993. The CCA's informed decision not to go further and adopt either the AAIDD 11th or DSM-5 wholesale as Texas's legal standard presents no error.

B. The Court of Criminal Appeals Correctly Concluded That Petitioner Did Not Meet His Burden to Prove Intellectual Disability.

The CCA correctly held that petitioner failed to establish that he is exempt from execution under *Atkins*. He failed to prove by a preponderance of the evidence that he has either significantly subaverage intellectual functioning or significant and related limitations in adaptive functioning. Pet. App. 63a-91a.

In reaching that conclusion, the court relied primarily on expert testimony. *See id.* That reliance pretermits petitioner's complaint that the CCA erred by not using the DSM-5 or AAIDD 11th definitions of intellectual disability. Pet. Br. 32. Both resources emphasize the

importance of clinical assessment in evaluating intellectual and adaptive functioning. DSM-5 at 37 (explaining that "[c]linical training and judgment are required to interpret test results and assess intellectual performance" and that "[a]daptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures"); AAIDD 11th at 11 (noting "the essential role of clinical judgment"). And there is no suggestion that the experts here employed outdated definitions to deliver unreliable opinions.

Only one of the three experts that met with petitioner for the purpose of assessing intellectual disability concluded that he is intellectually disabled.[23] Wright, one of petitioner's experts in his penalty-phase retrial, concluded that petitioner is "nowhere near" intellectually disabled. J.A. 269. Compton, the only forensic psychologist to examine petitioner and the only expert to administer a full-scale standardized test for intellectual functioning, also concluded that petitioner is not intellectually disabled. J.A. 185. Borda, one of petitioner's experts at his *Atkins* hearing, concluded that petitioner is intellectually disabled after conducting only a "very, very brief assessment" of him. J.A. 28. Acting in its role as fact finder, the CCA weighed the evidence and the experts' credibility and reasonably concluded that petitioner did not meet his burden under *Atkins*.

---

[23] Anderson met with petitioner, but did so for the purpose of determining whether petitioner had a brain anomaly or traumatic brain injury. J.A. 91-92.

1. The CCA correctly held that petitioner failed to meet his burden on intellectual functioning.

For the first prong of the intellectual-disability standard, petitioner had to show "significantly subaverage general intellectual functioning." Pet. App. 5a. That is "generally shown" by an IQ score of 70 or less, Pet. App. 5a-6a, taking into account a SEM of five points, Pet. App. 8a. That standard was confirmed by Compton's testimony, *see* J.A. 135, and generally conforms to the latest clinical definitions, DSM-5 at 37 (explaining that, "[o]n tests with a standard deviation of 15 and a mean of 100" and a SEM of 5 points, persons with intellectual disability will have "a score of 65-75 (70 ±5)"); AAIDD 11th at 31 (recognizing that "intellectual functioning is currently best represented by IQ scores" and the criterion for an intellectual-disability diagnosis is "an IQ score that is approximately two standard deviations below the mean, considering the [SEM]"). The CCA correctly held that petitioner failed to meet this standard.

Relying on expert testimony, the CCA determined that petitioner's only reliable IQ scores were the 78 on the WISC at age 13 and the 74 on the WAIS-R at age 30. Pet. App. 73a. Those exams were full-scale, individually administered tests. J.A. 143-44; Pet. App. 24a; *cf.* AAIDD 11th at 31 (recognizing that intellectual functioning is "best represented by IQ scores when they are obtained from appropriate, standardized[,] and individually administered" tests); DSM-5 at 37 (calling for IQ tests that are "individually administered"). Petitioner's expert Greenspan described the WISC as the "gold standard." J.A. 116.

The CCA did not consider petitioner's remaining scores—including scores of 77 and 85—because they all suffered from some expert-identified flaw: they came from exams that were non-comprehensive, group-administered, or neuropsychological tests rather than IQ tests; the scores were derived using discredited methods; or petitioner exhibited suboptimal effort. Pet. App. 64a-73a; J.A. 12-13, 55, 57, 115-16, 144, 154, 203. This decision to rely only on certain scores was not "cherry picking," as petitioner insists. Pet. Br. 36. The CCA declined to consider scores both below *and above* the scores from the two tests it found most reliable, and this analysis was based on the record and expert guidance. *Cf. Hall*, 134 S. Ct. at 1992 (noting uncritically that "the sentencing court excluded the two scores below 70 for evidentiary reasons").

Consistent with *Hall* and its own precedent, the CCA then applied the SEM to petitioner's valid IQ scores to derive ranges of possible results: the WISC score of 78 yielded a 73-83 range, and the WAIS-R score of 74 yielded a 69-79 range. Pet. App. 74a-75a. Thus, petitioner's claim that the CCA "ignor[ed] that [his] IQ scores must be treated as ranges, not precise numbers," Pet. Br. 37, is wrong.

Rather than applying a strict IQ cutoff to those scores or their ranges, the CCA considered other factors to get a complete picture of petitioner's intellectual functioning. Pet. App. 74a-75a. The court noted that the use of "now-outmoded version[s]" of the tests may have placed petitioner's true score in the lower portions of those ranges, *id.*—a reference to the disputed Flynn Effect recognized by the DSM-5 and AAIDD 11th, *see supra* p.31, which the court discussed earlier in its opinion, Pet. App. 8a. But other factors referenced by ex-

perts tended to place petitioner's true score in the higher reaches of those ranges. Pet. App. 74a-75a. Those factors included: petitioner's "impoverished" background, Pet. App. 74a, which Greenspan observed could cause an IQ score to underestimate intelligence, Pet. App. 67a; his "history of academic failure," Pet. App. 75a, which Greenspan testified could adversely affect testing effort, Pet. App. 69a, and which implicated Borda's testimony that the Wechsler tests were "oriented towards academic abilities," J.A. 23; and his traumatic childhood and depressive behavior in prison, Pet. App. 74a-75a, both of which Compton testified could have negatively affected his testing performance, J.A. 144-45. In light of all these considerations, the CCA reasonably concluded that petitioner's valid IQ scores fairly represented his intellectual functioning as being above the range of intellectual disability. Pet. App. 75a.

Petitioner ultimately concedes that the CCA treated his IQ scores as ranges, but complains that the court "did not give [him] the benefit of this range." Pet. Br. 37-38. Nothing in *Hall*, however, requires courts to treat a SEM-based range of scores whose lower end extends below 70 as the end of the intellectual-functioning inquiry. To the contrary, in those circumstances *Hall* contemplates that other evidence of intellectual capacity may be considered. *See* 134 S. Ct. at 1995. Clinical definitions likewise do not treat application of the SEM as conclusive. *See* AAIDD 11th at 36, 41 (explaining that the SEM "must be *part of* any decision concerning a diagnosis" and that assessing intellectual functioning "may, at times, require information from multiple sources" (emphasis added)).

Additional analysis may yield a finding that the upper end of the SEM range better reflects the offender's

true intellectual functioning. *See Ledford*, 818 F.3d at 640-41 (holding that the SEM "is merely a factor to consider when assessing an individual's intellectual functioning—one that may benefit or hurt that individual's *Atkins* claim, depending on the content and quality of expert testimony presented"); *Mays*, 757 F.3d at 218 n.17 (observing that the SEM "is not a one-way ratchet" and that even an offender with a score range that extends below 70 may fail to meet the first prong if "other evidence presented provides sufficient evidence of his intellectual functioning"). That is what the CCA concluded here based on a thorough analysis of the expert evidence. Pet. App. 74a-75a.

To the extent petitioner's complaint is that the CCA treated his intellectual functioning (not just IQ scores) as dispositive of his *Atkins* claim, and did not allow him to prove intellectual disability through a stronger showing on *adaptive functioning*, *see* Pet. Br. 36-37 & n.17, he misreads the Court's decisions in *Hall* and *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). As an initial matter, the CCA fully considered and rejected his adaptive-functioning arguments. Pet. App. 75a-89a; *see infra* Part I.B.2. Regardless, *Hall* and *Brumfield* establish that, due to the inherent imprecision in IQ testing, a score between 70 and 75 *alone* cannot defeat an *Atkins* claim, and in that circumstance a sufficient showing on the adaptive-functioning prong may establish intellectual disability. *Hall*, 134 S. Ct. at 2000 (concluding that "an individual with an IQ test score between 70 and 75 or lower may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning" (citation and internal quotation marks omitted)); *Brumfield*, 135 S. Ct. at 2278 (finding it unreasonable to conclude that "Brumfield's reported IQ

score of 75 somehow demonstrated that he could not possess subaverage intelligence"). But those cases do not hold that such a score is conclusive in the other direction—that is, a court is foreclosed from considering other evidence that would place an individual's true intellectual-functioning above that represented by an IQ score of 75. *See Hall*, 134 S. Ct. at 1996 (noting that "States which use a bright-line cutoff at 75 or greater . . . are not included alongside Florida in this analysis").

2. The CCA correctly held that petitioner failed to meet his burden on adaptive functioning.

For the second prong of the intellectual-disability standard, petitioner had to establish "significant limitations in adaptive functioning." Pet. App. 6a. This inquiry "refers to the ordinary skills that are required for people to function in their everyday lives." Pet. App. 9a. Here the CCA noted its "approval [of] the AAIDD's grouping of adaptive behavior into three areas (conceptual skills, social skills, and practical skills) for purposes of making a clinical diagnosis." *Id.*; *accord* AAIDD 11th at 1. That standard was confirmed by Compton's testimony, *see* J.A. 135, and further conforms to the APA's current standard, DSM-5 at 37 ("Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical."). The CCA correctly held that petitioner failed to satisfy this prong as well.

The CCA relied almost exclusively on expert evidence in concluding that petitioner did not prove significant limitations in adaptive functioning. Pet. App. 75a-88a. The court exhaustively recounted each expert's testimony, Pet. App. 75a-85a, and ultimately found Compton's opinion "far more credible and reliable" than those of petitioner's experts, Pet. App. 85a. That finding

rested on Compton's status as the only expert who specialized in forensic psychology, who fully reviewed petitioner's records (including those from judicial proceedings and prison), and who personally evaluated petitioner at length for the purpose of assessing intellectual disability. *Id.*; *see* J.A. 141-45. In contrast, the court found petitioner's experts to be less credible because, among other things, they reviewed "relatively limited material" and only Borda had examined petitioner for an intellectual-disability diagnosis, and then only briefly. Pet. App. 86a.[24]

Compton noted adaptive behavior in various ways, such as that petitioner lived on the streets, played pool for money, and mowed lawns. J.A. 146. The facts of the crime (wearing a wig, concealing the gun, absconding to Louisiana) and petitioner representing himself pro se, Compton testified, confirmed that petitioner was capable of abstract thought. J.A. 147-48, 182-83. Compton also found it significant that petitioner's experts from his penalty-phase retrial both attributed his withdrawn behavior to emotional problems, rather than intellectual disability, and recognized that his adaptive functioning improved in prison. J.A. 184. Petitioner's prison records indicated adaptive skills, including social skills, according to Compton. J.A. 160-62, 168-69. Because Compton determined that "[petitioner's] level of adaptive functioning had been too great, even before he went to pris-

---

[24] Greenspan refused to offer a diagnosis because he did not personally assess him. J.A. 120. Vitale's and Garnett's affidavits state that they reviewed some of petitioner's judicial-proceeding and prison records, but the CCA did not consider their affidavits because they did not testify at the hearing and therefore their opinions were not tested through the adversarial process. Pet. App. 85a n.56.

on, to support an intellectual disability diagnosis," the court held that he had failed to satisfy the adaptive-functioning prong. Pet. App. 88a; J.A. 185.

Given the DSM-5's and AAIDD 11th's emphasis on clinical judgment, the CCA's reasonable finding that Compton's qualifications and depth of review made her expert opinion the most credible, and the absence of any indication that Compton applied outdated methodology, petitioner's claim that the CCA "completely ignored the current diagnostic framework in assessing [his] adaptive deficits" falls flat. Pet. Br. 41. Moreover, the three arguments petitioner makes to support that charge should be rejected.

Petitioner's primary complaint is that the CCA purportedly weighed his adaptive deficits against his adaptive strengths to reject his showing on adaptive functioning. Pet. Br. 40-42. But all the "weighing" that petitioner attributes to the CCA occurs in its narrative recounting of Compton's testimony. Pet. App. 80a-88a. That discussion matters less than the CCA's ultimate endorsement of Compton's expert *conclusion* based on her credibility and reliability. Pet. App. 85a-86a, 88a. That conclusion was "I do not have the adaptive *deficits* for a diagnosis [of intellectual disability]," J.A. 185 (emphasis added), which comports precisely with petitioner's view of the proper standard, Pet. Br. 39-40.

In all events, because petitioner's *Atkins* claim calls for a "legal determination" rather than a "medical diagnosis," *Hall*, 134 S. Ct. at 2000, a discussion of petitioner's adaptive strengths was not impermissible even if a clinician would not consider them. This Court has suggested that the "degree of advanced planning" and "acquisition of a car and guns" for a crime would at least "arguably" be evidence of "adaptive skills" that "cut

against [a] claim of intellectual disability." *Brumfield*, 135 S. Ct. at 2280-81. Various circuits agree that adaptive strengths may be considered in evaluating *Atkins* claims. *See, e.g.*, *Hooks*, 689 F.3d at 1172 ("Both strengths and deficiencies enter into this equation because they make up the universe of facts tending to establish that a defendant either has 'significant limitations' or does not."); *Ortiz v. United States*, 664 F.3d 1151, 1169 (8th Cir. 2011) ("Consideration of an individual's strengths may often prove necessary to provide context and definition for consideration of reported deficits."); *Clark v. Quarterman*, 457 F.3d 441, 447 (5th Cir. 2006) (noting that "evidence of a strength in a particular area of adaptive functioning necessarily shows that the defendant does not have a weakness in that particular area").

Petitioner also faults the CCA's reference to his adaptive skills in prison. Pet. Br. 42. Again, though, that reference appeared in the recounting of testimony from Compton, Pet. App. 80a-85a, who ultimately concluded that "[e]ven before prison" petitioner's adaptive functioning would not support an intellectual-disability diagnosis, J.A. 185. That explanation comports with the DSM-5, which states that assessing adaptive functioning in prison settings is "difficult" (not impossible) and that "corroborative information reflecting functioning outside those settings should be obtained." DSM-5 at 38.

Finally, petitioner claims that the CCA's analysis somehow conflicts with clinicians' current "greater emphasis on the crucial role of adaptive deficits in a diagnosis of intellectual disability." Pet. Br. 42. But once again, the CCA's conclusion on adaptive functioning rested almost entirely on the expert opinion of Comp-

ton, who testified that "the majority of the emphasis" in diagnosing intellectual disability "is now with adaptive deficits or adaptive functioning." J.A. 136. And petitioner's lack of adaptive deficits was the central basis for her determination that he is not intellectually disabled. J.A. 185.

3. The CCA correctly held that petitioner failed to meet his burden to show that his asserted adaptive functioning deficits are directly "related" to his asserted intellectual functioning deficits.

Even if petitioner had met his burden to prove significantly subaverage intellectual functioning and significant limitations in adaptive functioning, he was still required to show further that the adaptive deficits are "related" to limited intellectual functioning. Pet. App. 6a. As discussed above, the CCA originally adopted this "relatedness" requirement from the AAMR 9th, *Briseno*, 135 S.W.3d at 7 (quoting AAMR 9th at 5), and it currently appears in the DSM-5's discussion of diagnostic features, DSM-5 at 38 ("To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be *directly related* to the intellectual impairments described in Criterion A." (emphasis added)). The CCA correctly concluded, as a second alternative holding, that petitioner also failed to satisfy this relatedness prong. Pet. App. 88a.

The CCA found that the record "overwhelmingly" showed that numerous factors affected petitioner's adaptive functioning before age 18. Pet. App. 88a-89a. Those factors included emotional and physical abuse, undiagnosed learning disorders, frequent transfers to different schools, racially motivated harassment and

violence, and drug abuse. *Id.* The CCA also noted that, when those factors were largely removed from petitioner's life due to his imprisonment, he showed "significant advances" in adaptive behavior. Pet. App. 89a. Thus, the CCA reasonably concluded that petitioner had not proven by a preponderance of the evidence that his asserted adaptive deficits were "related" to limitations in intellectual functioning. Pet. App. 88a-89a.

Petitioner complains that the CCA's reading of the relatedness requirement is "clinically unwarranted." Pet. Br. 43. Without citing authority, petitioner contends that the clinical relatedness inquiry is "routine and unexceptional," and serves only to exclude "common-sense" explanations for adaptive deficits, such as blindness or cultural differences. *Id.* And he urges that the CCA's view imposes an unreasonable causation requirement given that "environmental challenges and other disorders" can co-exist with intellectual disability. *Id.* at 44-45.

Petitioner's call for a strict clinical application of the relatedness requirement is misplaced. Because a clinical diagnosis of intellectual disability is directed at "develop[ing] a profile of needed supports" to "improve" "life functioning," *see* AAIDD 11th at 1, it may indeed "make[] clinical sense" to examine only whether adaptive deficits are related to "a wholly different factor," Pet. Br. 43, so that inapt or ineffective support systems are not prescribed. But the law requires more. Simply because environmental challenges and other disorders "can" co-exist with intellectual disability, *id.* at 44, does not mean that they always do. And the law does not exempt from execution a person whose adaptive deficits are associated with environmental challenges or per-

sonality disorders as opposed to intellectual-functioning deficits.

On this prong, then, the "distinct[ion]" between "a legal determination" and a "medical diagnosis" is significant. *See Hall*, 134 S. Ct. at 2000. Accordingly, the CCA reasonably requires *Atkins* claimants to show a direct relationship between adaptive deficits and limitations in intellectual functioning "rather than some other cause." Pet. App. 10a. Petitioner failed to do that here.

II. Alternatively, This Court Could Remand for the Court of Criminal Appeals to Give Further Consideration to the Most Recent Clinical Definitions of Intellectual Disability.

As explained above, the CCA's careful analysis of the legal standard and expert testimony "consult[ed] the medical community's opinions," *Hall*, 134 S. Ct. at 1993, as reflected in the APA's and AAIDD's latest intellectual-disability definitions. If the Court concludes that the CCA did not sufficiently consult these sources, then the appropriate remedy would not be to install part or all of those definitions as a national *Atkins* standard. After all, the alleged error that petitioner asks this Court to review and correct is the CCA's purported "decision to prohibit consideration of the medical community's *current* 'diagnostic framework.'" Pet. Br. 24. By definition, then, the redress for that claimed injury would be a remand with instructions to give due "consideration" to that framework.

In that sense, this issue resembles judicial review of an administrative agency's action. Just as this Court reserves a "critical role" for States to exercise some discretion in substantively implementing *Atkins*, *Hall*, 134 S. Ct. at 1998, courts do not substitute their judg-

ment for that of an agency in reviewing a rule or policy, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). And just as the Court expects States to "consult the medical community's opinions" in "determining who qualifies as intellectually disabled," *Hall*, 134 S. Ct. at 1993, so must an administrative agency "examine the relevant data and articulate a satisfactory explanation for its action," *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

If an agency fails to provide a sufficiently reasoned explanation, the proper remedy is to remand to the agency for additional explanation. *E.g.*, *id.* at 34. Similarly, if the Court concludes that the CCA did not sufficiently consider the latest clinical guidance in resolving this *Atkins* claim, it should remand so that the CCA may sufficiently "consult" those sources and provide further explanation regarding whether its intellectual-disability definition remains "informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 1993, 2000.

III. The Optional *Briseno* "Relatedness" Factors Do Not Render Texas's Three-Part Definition of Intellectual Disability Unconstitutional.

Petitioner and his amici focus significant portions of their arguments on optional evidentiary factors that the CCA in *Briseno* approved for use in analyzing whether adaptive deficits are "related" to limitations in intellectual functioning. *E.g.*, Pet. Br. 49-59; ABA Amicus Br. 10-16; ACLU Amicus Br. 8-30; American Psychological Association Amicus Br. 16-26; AAIDD Amicus Br. 29-33. Those efforts are misdirected.

A. When the CCA in *Briseno* adopted standards for resolving *Atkins* claims, it noted that the court would not simply be choosing between competing expert opinions, but also would be considering "all of the evidence" that bore on the question. 135 S.W.3d at 8-9. To that end, the court identified seven optional "evidentiary factors" that factfinders "might also focus upon in weighing evidence as indicative of [intellectual disability] or of a personality disorder." *Id.* at 8.

Those factors will be discussed below, but one aspect of the CCA's prefatory statement warrants significant attention. The words "might also" mean that the *Briseno* factors are purely an optional suggestion that is not part of Texas's three-part definition of intellectual disability. *Cf.* Pet. Br. 49. The CCA has expressly confirmed this:

> [T]hose factors are not part of the definition of "intellectual disability," and trial and appellate courts may ignore some or all of them if they are not helpful in a particular case.

Cathey, 451 S.W.3d at 10 n.22; *accord Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) (noting that "we did not make consideration of any or all of these factors mandatory").

The CCA's discussion of the *Briseno* factors in this case demonstrates their optional nature and limited purpose. The CCA first determined that petitioner failed to carry his burden on the intellectual-functioning prong, and that failure alone was fatal to his *Atkins* claim. Pet. App. 63a-75a. The court went on to hold, in the alternative, that petitioner had not established significant limitations in adaptive functioning under the second prong. Pet. App. 75a-88a. That, too, independently sufficed to defeat petitioner's claim. The

court then held, in the *further* alternative, that even if petitioner had shown the requisite significant adaptive deficits, he had not made the necessary "relatedness" showing that any adaptive deficits "were linked to significantly sub-average intellectual functioning." Pet. App. 88a. That conclusion was based primarily on the court's overall review of the record. Pet. App. 88a-89a & n.58.

Only then did the court note that, "[i]n addition," the optional *Briseno* factors weighed against a finding that petitioner's adaptive deficits were "related" to significantly subaverage general intellectual functioning. Pet. App. 89a. The ensuing discussion of those factors covers approximately two pages in the 92-page majority opinion. Pet. App. 89a-91a. To summarize, the CCA applied the optional *Briseno* factors to *bolster* a *second alternative* holding on petitioner's *Atkins* claim. The optional *Briseno* factors therefore had an attenuated and extraneous role in this case and have no bearing on the question presented.

B. To the extent that the optional *Briseno* factors' validity is at issue here, they are a legitimate tool developed to help courts implement *Atkins*. Each of the factors is grounded in this Court's precedent:

- "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he [had an intellectual disability] at that time, and, if so, act in accordance with that determination?" *Briseno*, 135 S.W.3d at 8. *Hall* endorsed this sort of inquiry, noting that Hall's "substantial and unchallenged evidence of intellectual disability" included "that his teachers identified him on numerous occa-

sions as '[m]entally retarded'" and that "Hall's siblings testified that there was something 'very wrong' with him as a child." 134 S. Ct. at 1990-91.

- "Has the person formulated plans and carried them through or is his conduct impulsive?" *Briseno*, 135 S.W.3d at 8. *Atkins* referred to the diminished capacity to "control impulses" as a reason to exempt persons with intellectual disability from execution. 536 U.S. at 318, 320; *see also id.* at 306.
- "Does his conduct show leadership or does it show that he is led around by others?" *Briseno*, 135 S.W.3d at 8. *Atkins* observed that "in group settings" persons with intellectual disability "are followers rather than leaders." 536 U.S. at 318.
- "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?" *Briseno*, 135 S.W.3d at 8. *Atkins* noted that persons with intellectual disabilities "have diminished capacities to understand and process information" and "to understand the reactions of others." 536 U.S. at 318; *see also id.* at 320.
- "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?" *Briseno*, 135 S.W.3d at 8. *Atkins* explained that persons with intellectual disabilities "have diminished capacities to understand and process information," "to communicate,"

and "to engage in logical reasoning." 536 U.S. at 318; *see also id.* at 320.

- "Can the person hide facts or lie effectively in his own or others' interests?" *Briseno*, 135 S.W.3d at 8. This factor reflects *Atkins*'s comment that "the cold calculus that precedes the decision" to commit capital murder "is at the opposite end of the spectrum from behavior of [offenders with intellectual disability]." 536 U.S. at 319-20.
- "Putting aside any heinousness or gruesomeness surrounding [his] capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Briseno*, 135 S.W.3d at 8-9. *Brumfield* states that the evidence that "cut against" intellectual disability included that "the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns." 135 S. Ct. at 2280-81.

These optional *Briseno* evidentiary factors track specific applications of this Court's precedents regarding *Atkins* claims. Thus, the Fifth Circuit has repeatedly confirmed—both before and after *Hall*—that the *Briseno* factors present no constitutional concern. *Williams v. Stephens*, 761 F.3d 561, 572 (5th Cir. 2014); *Mays*, 757 F.3d at 217; *Chester*, 666 F.3d at 346-47.

But even if the Court were to disapprove of these optional *Briseno* factors, that would not warrant either

a rejection of Texas's three-part intellectual-disability standard (initially recognized separately in *Briseno*) or a reversal in this case. Those factors "are not part of the definition of 'intellectual disability'" in Texas, *Cathey*, 451 S.W.3d at 10 n.22, and the CCA's brief discussion of them here was unnecessary to its decision, *see* Pet. App. 89a.

C. In all events, any assessment of the optional *Briseno* factors—or Texas's separate three-part test for intellectual disability—should not be tainted by the strained efforts of petitioner and amicus ACLU to link them to *Briseno*'s fleeting mention of the character "Lennie" from the novel *Of Mice and Men*. *See* Pet. Br. 1, 21 n.15, 24, 26, 54 n.27, 56; ACLU Br. 3-7, 16-27. That lone literary reference has never been part of Texas's *Atkins* standard.

The context in which the "Lennie" reference appears in *Briseno* proves its irrelevance. The CCA began by noting that *Atkins* had left to the States "the task" of developing ways to implement the prohibition on executing persons with intellectual disability. 135 S.W.3d at 5 (quoting *Atkins*, 536 U.S. at 317). Because the CCA was undertaking that task in the Legislature's stead, it believed that the standard it adopted should reflect "a consensus of Texas citizens." *See id.* at 5, 6. Here, the CCA remarked: "Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt." *Id.* at 6. "But," the court went on, the question remained whether there was "a national or Texas consensus" that the legal standard for *Atkins* claims should be co-extensive with the clinical standard for social services. *Id.* The court "decline[d] to answer that normative question without significantly greater assistance from the citi-

zenry acting through its Legislature." *Id.* The court therefore appropriately consulted the Legislature's intellectual-disability definition in the Texas Health and Safety Code, which it adopted for *Atkins* purposes along with the "similar" AAMR 9th definition. *Id.* at 6-8.

The "Lennie" comment should be understood for what it actually was: an aside. If redacted, the meaning of the paragraph would be unchanged—the CCA did not want to adopt an *Atkins* standard without consulting guidance from the Legislature. *Id.* The remark has nothing to do with the pre-existing definitions of intellectual disability that the CCA endorsed, *id.* at 8, nor does it inform the optional *Briseno* evidentiary factors that the court described later in the opinion, *id.* at 8-9.

If further proof were needed that petitioner's "Lennie" arguments are baseless, it may be found in the fact that the reference appears again only once in the CCA's majority opinions—while quoting a trial court's discussion, which appears in a footnote, in a case where the CCA *granted* an *Atkins* claim following the trial court's recommendation. *Van Alstyne*, 239 S.W.3d at 822 n.21.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted.

KEN PAXTON
Attorney General
of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

RANCE CRAFT
MICHAEL P. MURPHY
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@
texasattorneygeneral.gov
(512) 936-1700

SEPTEMBER 2016

Appendix

APPENDIX

COMPARISON OF STATE *ATKINS* STANDARDS AND CLINICAL DEFINITIONS[1]

STATE	CLOSEST CLINICAL DEFINITION	STATE *ATKINS* STANDARD
AL	DSM-IV-TR[2] or AAMR 9th[3]	*Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)[4]
AZ	DSM-III-R[5]	Ariz. Rev. Stat. § 13-753(K)[6]
AR	DSM-III-R	Ark. Code § 5-4-618(a)(1)

---

[1] For each State that currently imposes the death penalty, this table identifies the clinical definition of intellectual disability that most closely corresponds to the State's standard for determining whether an offender is exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The "closest clinical definition" is the one that the State has either incorporated by reference or that uses the most similar language. Significant variations between a state standard and the closest clinical definition are noted.

[2] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., Text Revision 2000).

[3] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992).

[4] In *Perkins*, the Alabama Supreme Court adopted the clinical definitions cited in *Atkins*.

[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed., Rev. 1987).

[6] Arizona's standard also echoes the AAMD 8th definition in that it refers to "adaptive behavior" rather than "adaptive functioning" and uses the AAMD 8th definition of "adaptive behavior."

CA	DSM-IV-TR or AAMR 9th	*In re Hawthorne*, 105 P.3d 552, 556-57 (Cal. 2005)[7]
CO	AAMD 8th[8]	Colo. Rev. Stat. § 18-1.3-1101(2)
FL	AAMD 8th	Fla. Stat. § 921.137(1)
GA	DSM-III[9]	Ga. Code § 17-7-131(a)(3)[10]
ID	DSM-IV-TR	Idaho Code § 19-2515A(1)
IN	AAMR 10th[11]	Ind. Code § 35-36-9-2[12]
KS	AAMD 8th	Kan. Stat. § 76-12b01[13]

[7] California's statute appears to be modeled on the AAMD 8th definition. Cal. Penal Code § 1376(a). But the California Supreme Court has held that the standard derives from the two clinical definitions cited in *Atkins* (DSM-IV-TR and AAMR 9th) and that an adaptive-behavior showing must meet those formulations. *Hawthorne*, 105 P.3d at 556-57.

[8] American Association on Mental Deficiency, *Classification in Mental Retardation* (8th ed. 1983).

[9] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980).

[10] The third prong of Georgia's standard resembles the AAMD 8th more closely than the DSM-III in that it requires the first two prongs to have "manifested during the developmental period" rather than "before the age of 18."

[11] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002).

[12] Indiana's definition differs from the AAMR 10th in that (1) it requires "substantial impairment of adaptive behavior" rather than "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical skills"; and (2) the age of onset is 22. But the Indiana Supreme Court has described the two definitions as "very similar." *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005).

KY	AAMD 8th	Ky. Rev. Stat. § 532.130(2)
LA	DSM-5[14]	La. Code Crim. Proc. art. 905.5.1(H)
MS	DSM-5 or AAIDD 11th[15]	*Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015)
MO	AAMR 9th	Mo. Stat. § 565.030(6)
MT	None	None
NV	DSM-IV-TR and AAMR 10th	*Ybarra v. State*, 247 P.3d 269, 273-74 & n.6 (Nev. 2011) (en banc)[16]
NH	None	None[17]
NC	AAMR 9th	N.C. Gen. Stat. § 15A-2005(a)(1)
OH	AAMR 9th	*State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (per curiam)

[13] Kansas recently eliminated the age-of-onset requirement. 2016 Kan. Laws ch. 108 (H.B. 2049).

[14] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

[15] American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010).

[16] Nevada's statute appears to be modeled on the AAMD 8th definition. Nev. Rev. Stat. § 174.098(7). But the Nevada Supreme Court has held that the DSM-IV-TR and AAMR 10th "provide useful guidance in applying" the statute because of the definitions' "similarities." *Ybarra*, 247 P.3d at 274.

[17] New Hampshire's intellectual-disability definition for social services, N.H. Rev. Stat. § 171-A:2(XI-a), tracks the AAMD 8th, but it has not been adopted for or applied to *Atkins* claims.

OK	AAMR 9th	Okla. Stat. tit. 21, § 701.10b(A)-(B)
OR	DSM-5	*State v. Agee*, 364 P.3d 971, 990 (Or. 2015) (en banc)
PA	DSM-IV-TR or AAIDD 11th	*Commonwealth v. Bracey*, 117 A.3d 270, 273 & n.4 (Pa. 2015)
SC	AAMD 8th	S.C. Code § 16-3-20(C)(b)(10)
SD	AAMR 9th	S.D. Codified Laws § 23A-27A-26.2
TN	AAMD 8th	Tenn. Code § 39-13-203(a)[18]
TX	AAMR 9th	*Ex parte Briseno*, 135 S.W.3d 1, 7-8 & n.26 (Tex. Crim. App. 2004)
UT	DSM-IV-TR	Utah Code § 77-15a-102[19]
VA	AAMR 10th	Va. Code § 19.2-264.3:1.1(A)[20]

[18] The Tennessee Supreme Court has stated that its interpretation of this statute is consistent with the AAIDD 11th and the DSM-IV-TR. *Coleman v. State*, 341 S.W.3d 221, 244-47 (Tenn. 2011).

[19] Utah's statute is unlike any clinical definition in that (1) it requires adaptive deficits "that exist primarily in the areas of reasoning or impulse control, or in both of these areas"; and (2) the age of onset is 22. But the Utah Supreme Court has opined that the DSM-IV-TR definition is "much like our statute." *State v. Maestas*, 299 P.3d 892, 948 n.245 (Utah 2012).

[20] The first prong of Virginia's standard resembles the AAMR 9th more closely than the AAMR 10th in that it requires "significantly subaverage intellectual functioning" as opposed to "significant limitations . . . in intellectual functioning."

WA	AAMD 8th	Wash. Rev. Code § 10.95.030(2)
WY	AAMD 8th	Wyo. Stat. § 8-1-102(a)(xiii)

ECORD
AND
BRIEF

Supreme Court, U.S.
FILED
OCT - 6 2016
OFFICE OF THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

REPLY BRIEF FOR PETITIONER

Alex Blaszczuk
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Luke Varley
601 Lexington Avenue
New York, NY 10022

Clifford M. Sloan
Counsel of Record
Lauryn K. Fraas
Donald P. Salzman
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 11

I. The CCA's Interpretation of Intellectual Functioning Is Inconsistent with the Medical Community's Diagnostic Framework 12

II. The CCA's Interpretation of Adaptive Behavior Is Inconsistent with the Medical Community's Diagnostic Framework 14

A. The CCA Weighed Purported Strengths Against Adaptive Deficits 15

B. The CCA Relied Heavily On Its Non-Medical *Briseno* Factors 17

C. The CCA Required Proof of "Relatedness" In the Form of a Causal Link Between Intellectual Deficits and Adaptive Deficits 20

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Page(s)

Atkins v. Virginia,
536 U.S. 304 (2002) 1, 6, 20

Ex parte Briseno,
135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex parte Butler,
416 S.W.3d 863 (Tex. Crim. App. 2012) ... 16, 17

Ex parte Cathey,
451 S.W.3d 1 (Tex. Crim. App. 2014) 21

Ex parte Chester,
No. AP-75037, 2007 WL 602607 (Tex. Crim. App. Feb. 28, 2007) 17

Coleman v. State,
341 S.W.3d 221 (Tenn. 2011) 8

Hall v. Florida,
134 S. Ct. 1986 (2014) ..... *passim*

Ledford v. Warden,
818 F.3d 600 (11th Cir. 2016) 13

Lizcano v. State,
No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) 17, 19

Ex parte Mathis,
WR-50,772-03, slip op. (268th D. Ct. Fort Bend Cty. Tex. Jan. 4, 2006), *adopted*, 2006 WL 2706745 (Tex. Crim. App. Sept. 20, 2006) 19

Ex parte Smith,
No. AP-76906, 2012 WL 5450895
(Tex. Crim. App. Nov. 7, 2012) 11

Ex parte Sosa,
364 S.W.3d 889 (Tex. Crim.
App. 2012) ..... *passim*

Ex parte Taylor,
No. WR-48498-02, 2006 WL 234854 (Tex.
Crim. App. Feb. 1, 2006) 17, 18

Ex parte Taylor,
No. C-297-006327-0542281-B, slip op.,
adopted in all relevant parts, Sept. 26,
2005 Order (297th D. Ct. Jefferson Cty.
Tex.), *aff'd*, No. WR-48498-02, 2006 WL
234854 (Tex. Crim. App. Feb. 1, 2006) 3

Ex parte Thomas,
W86-85539-M(B), slip op. (194th D. Ct.
Dallas Cty. Tex. Sept. 30, 2006), *adopted*,
No. WR-16556-04, 2006 WL 3692644
(Tex. Crim. App. Dec. 13, 2006) 19

Ex parte Van Alstyne,
239 S.W.3d 815 (Tex. Crim. App. 2007) 2

Ex parte Wilson,
No. 62490-B, slip op. (252nd D. Ct.
Jefferson Cty. Tex. Aug. 31, 2004), *aff'd*,
WR-46,928-02 (Tex. Crim. App. Nov. 10,
2004) 18

Ex parte Woods,
296 S.W.3d 587 (Tex. Crim. App. 2009) 17

Ybarra v. State,
247 P.3d 269 (Nev. 2011) 8

STATUTES

Tex. Hum. Res. Code Ann. § 114.002 (West) 7

Tex. Ins. Code Ann. § 1355.001 (West) 7

REGULATIONS

37 Tex. Admin. Code § 343.100(26) 7

37 Tex. Admin. Code § 380.8751(e)(3) 7

37 Tex. Admin. Code §380.8779(e)(2)(B) 7

INTRODUCTION

The principles in this case are straightforward. The Eighth Amendment "forbid[s] the execution of persons with intellectual disability." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002). "Intellectual disability is a condition[.]" *Hall*, 134 S. Ct. at 2001. Thus the inquiry into intellectual disability "is informed by the medical community's diagnostic framework." *Id.* at 1993, 2000.

The Texas Court of Criminal Appeals ("CCA") has sharply deviated from this Court's decisions. In *Atkins*, this Court held that the intellectually disabled are excluded from execution as "a categorical rule." 536 U.S. at 320. But the CCA's seminal decision on *Atkins* held it an open question in Texas whether there is "a 'mental retardation' bright-line exemption from our state's maximum statutory punishment." *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). The CCA viewed its task as defining "that level and degree of mental retardation at which *a consensus of Texas citizens* would agree that a person should be exempted from the death penalty." *Id.* (emphasis added). In *Atkins*, this Court "point[ed] to the diagnostic criteria employed by psychiatric professionals." *Hall*, 134 S. Ct. at 2000. But in *Briseno*, the CCA—while ostensibly adopting a 1992 clinical definition of intellectual disability—criticized the medical community's diagnostic framework as "exceedingly subjective," and fashioned its own additional "factors" for intellectual disability derived from lay stereotypes and lacking any clinical foundation. 135 S.W.3d at 8-9. The CCA has repeatedly reaffirmed *Briseno*—reasserting, for example, that an

intellectual-disability determination is "instructive" but not "conclusive," *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012), and that its *Briseno* "factors" are "non-diagnostic." *Ex parte Van Alstyne*, 239 S.W. 3d 815, 820 (Tex. Crim. App. 2007).

In this case, the CCA's sharp deviation from this Court's decisions and from "the medical community's diagnostic framework," *Hall*, 134 S. Ct. at 2000, continued and increased. The CCA strongly reaffirmed *Briseno*—every element of that deeply problematic decision—without qualification. Pet. App. 6a-8a. It proceeded to rely "heavily" on its *Briseno* factors (*id.* at 89a), which are inconsistent with the medical community's diagnostic framework. And the CCA took its conflict with this Court's decisions and "the medical community's diagnostic framework" a major step further by prohibiting the use of current medical standards in *Atkins* claims—once again, based on the CCA's view of "the subjectivity" of "the medical diagnosis of intellectual disability." *Id.* at 6a-7a.

Respondent seeks to deflect from the CCA's glaring deviation from this Court's decisions in several ways. But none obscure the central flaws in the CCA's rejection of the "medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. Many of Respondent's suggestions also are erroneous on their own terms. Accordingly, it is helpful at the outset to address some of Respondent's principal deflections before turning to core problems in the CCA's evaluation of Petitioner's intellectual-disability claim.

Briseno Factors as "Optional": Respondent seeks to minimize the non-medical *Briseno* factors as merely "optional" and "not relevant to the outcome" here. Resp. Br. 18. But this is wrong on both counts. *First*, the CCA emphasized that the factors "weigh[ed] heavily" in its lack-of-intellectual-disability determination (Pet. App. 89a); Respondent cannot simply elide that holding or wish it away. *Second*, the CCA has rejected an intellectual-disability finding solely because the lower court did not consider a *Briseno* factor. *Sosa*, 364 S.W.3d at 893-94. That holding alone belies their "optional" nature. *Third*, lower courts have heeded the CCA's emphasis on the *Briseno* "factors"—leading one court, in a decision upheld by the CCA, to stress that, in Texas, the factors receive "at least equal weight" as medical criteria.[1] And, *fourth*, that the factors are sometimes treated as vitally important and sometimes termed "optional" vividly highlights the arbitrariness, uncertainty and incoherence of the CCA's approach to this fundamental Eighth Amendment issue—which is especially troubling in light of the stark conflict between these lay-stereotype "factors" and clinical standards. Pet. Br. 52-55.

The Role of Lennie: Respondent maintains that the *Briseno* invocation of Steinbeck's Lennie is "irrelevan[t]." Resp. Br. 56. The important issue, of course, is the foundational erroneous point for which Lennie was invoked—that the CCA deems it an open question whether all "mentally retarded" in Texas

---

[1] *Ex parte Taylor*, No. C-297-006327-0542281-B, slip op., 24, *adopted in all relevant parts*, Sept. 26, 2005 Order (297th D. Ct. Jefferson Cty. Tex.), *aff'd*, No. WR-48498-02, 2006 WL 234854, at *1 (Tex. Crim. App. Feb. 1, 2006) (per curiam).

are protected by *Atkins*. *Briseno*, 135 S.W.3d at 6; *see also Sosa*, 364 S.W.3d at 892 ("[i]n cases of severe mental retardation," execution is "certainly" prohibited; in other cases, such as "where IQ scores are near the threshold of mild retardation," a clinical diagnosis is "instructive" but not "conclusive"). At least one CCA judge, moreover, does not share Respondent's view that the invocation of Lennie at a pivotal point in the CCA's seminal *Atkins* decision is irrelevant in Texas intellectual-disability jurisprudence: "In referring to Lennie as someone who might be exempt from execution whereas others unlike him would not be, this Court's opinion has been read as implying or holding that those individuals who are less than severely or profoundly intellectually disabled would not be exempt from execution." Pet. App. 117a (Alcala, J., dissenting).

Prohibition on Current Medical Standards: Respondent suggests that the CCA's decision does not actually prohibit the use of current medical standards. But, here too, Respondent's statement does not make it so. The CCA's determination that the trial court "erred" by using current medical standards is clear and explicit. Pet. App. 6a-7a. This is now the law of Texas. The CCA made this holding even while recognizing that "[i]t may be true that the [American Association on Intellectual and Developmental Disabilities ("AAIDD")'s] and [American Psychiatric Association ("APA")'s] positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseno* were decided." *Id.* Respondent intimates (at 36) that the CCA was simply correcting the trial court about its subordinate role in the judicial hierarchy. But the CCA also prohibited current medical standards *as its own current and*

prospective standard for *Atkins* claims, which Texas courts must follow. Pet. App. 7a. Respondent likewise points (at 38) to a handful of scattered references to current standards for the proposition that the CCA considered those standards. But the CCA's decision is not saved from its across-the-board prohibition on current medical standards by the fact that, notwithstanding its general rule, it referred to current standards on a few occasions (with characterizations that are themselves erroneous, Pet. Br. 44 n.22). Indeed, if anything, the fact that the CCA occasionally invokes current medical standards in an effort to bolster rejecting Petitioner's *Atkins* claim, while otherwise prohibiting use of the current diagnostic framework, again highlights the arbitrariness and unpredictability of the CCA's approach.[2]

Straw man characterization of Petitioner's position: Respondent raises a straw man—that Petitioner seeks a rule requiring "precise" adherence to a clinical organization's most recent definition of intellectual disability by every State. Resp. Br. I, 1. Respondent (and its amici) even restate the Question Presented to reflect their straw man. But that is not, and never has been, Petitioner's position. This

---

[2] The CCA's conclusory assertion (Pet. App. 7a n.5) that "*Briseno*'s legal definition remains generally consistent" with the current clinical definition—without analysis, without explanation, and without even considering either its acknowledgement that the AAIDD and APA "positions regarding the diagnosis of intellectual disability" may have changed since *Briseno*, *id.* at 6a, or the conflict between its non-medical "factors" and clinical criteria—likewise does not justify prohibiting use of the current diagnostic framework. Moreover, the conclusory statement is erroneous: *Briseno* cannot be reconciled with the diagnostic framework. *See* Pet. Br. 31-59; *infra*, 11-23; AAIDD Br. 4, 28-33; APA Br. 4-6, 14-26.

Court's position on the relationship between clinical standards and the legal determination in the *Atkins* context is clear. As *Hall* explained, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." 134 S. Ct. at 2000. Being "informed by the medical community's diagnostic framework" does not mean "precise" recitation. But, just as clearly, it does not mean prohibiting use of the current diagnostic framework or adopting judicially-created "factors" in conflict with that framework. Respondent rejects this view, maintaining that this Court has given the States broad "latitude" in "substantively defining intellectual disability for *Atkins* purposes." Resp. Br. 16, 22. Texas overreaches. While this Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,'" *id.* at 1 (quoting *Atkins*, 536 U.S. at 317), it did not give States the authority to fundamentally reshape the condition (through rejection of current standards, erroneous interpretations of diagnostic criteria, and creation of non-medical "factors" derived from lay stereotypes and lacking any clinical justification) in order to limit the group of *Atkins*-eligible intellectually-disabled individuals, as Texas has done.

Texas as Outlier: Respondent and its amici contend that Texas is not an outlier. But Texas and its amici do not point to a single other State that prohibits its current medical standards, as Texas now does. Pet. App. 5a-7a. Nor do they cite a single other State that has created its own non-medical "factors" for as-

sessing adaptive behavior.[3] Both characteristics make Texas a conspicuous outlier. Moreover, neither Respondent nor its amici even address the telling fact that the CCA's approach to *Atkins* claims is an outlier *within Texas itself*. In other non-*Atkins* intellectual-disability contexts, Texas *requires*, rather than *prohibits*, use of current medical standards. *See, e.g.*, 37 Tex. Admin. Code § 380.8779(e)(2)(B) (intellectual-disability determination for juvenile justice discharge requires diagnosis "based upon the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association").[4] *Compare Hall*, 134 S. Ct. at 1993 ("[T]he definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty."). The CCA is plainly an outlier in its approach to intellectual disability under *Atkins*—whether one considers the other 29 States with the death penalty; the 20 States without the death penalty who consider intellectual disability in other

---

[3] Only one high state court (Pennsylvania) and one intermediate state court (Tennessee) have allowed use of the CCA-created *Briseno* factors (and in Pennsylvania, only in limited circumstances). Pet. Br. 55. The overwhelming majority of States have not adopted such an approach. *Id.*

[4] *See also, e.g.*, 37 Tex. Admin. Code § 343.100(26) (intellectual-disability diagnosis for juvenile detention based on "the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders"); *id.* § 380.8751(e)(3) (intellectual-disability diagnosis based on "latest edition of the DSM"). *Cf.* Tex. Hum. Res. Code Ann. § 114.002 (West) (autism diagnosis defined by "the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), 5th Edition"); Tex. Ins. Code Ann. § 1355.001 (West) ("Serious mental illness" determination based on definition "by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM)").

contexts; or even Texas law on intellectual disability in non-*Atkins* contexts.[5]

Evaluation of the record: In minimizing the CCA's *Briseno* "factors" and prohibition against the current diagnostic framework, Respondent suggests that the decision here reflects a routine and unobjectionable weighing of evidence and experts. Respondent ignores the critical fact, however, that the CCA, with its no-current-medical-standards and *Briseno*-centric framework, applied a fundamentally distorted legal lens to its evaluation of the record. The permissibility of using the current and appropriate diagnostic framework in Texas is a legal issue. It necessarily has a profound impact on the evaluation of evidence and testimony. It cannot be batted aside

---

[5] Respondent's "counting" of States also is rife with problems on its own terms. For example, Respondent counts, as conflicting-with-current-medical-standards, States that sensibly interpret their statutes in light of current medical standards. *See, e.g.*, *Ybarra v. State*, 247 P.3d 269, 273-74 (Nev. 2011) (en banc); *Coleman v. State*, 341 S.W.3d 221, 244-47 (Tenn. 2011). Respondent likewise erroneously counts as opposing-current-medical-standards States with wording differences from current standards even though there is no suggestion that those differences are material. *See, e.g.*, Resp. Br. 4a n.20 (relying on differences between "significantly subaverage general intellectual functioning" and "significant limitations" in first prong of intellectual disability inquiry, notwithstanding that clinical guidance makes clear that the concept of "significantly subaverage" remains part of the clinical inquiry as to the first prong). Moreover, Respondent's appendix (and that of its amici) are inapposite: they do not address the actual issues in this case—whether other States prohibit the use of current medical standards and whether other States apply judicially-created "factors" that conflict with the medical community's diagnostic framework.

on the ground that the CCA was merely reviewing the record.

Professional organizations: Respondent seeks to discredit current medical and clinical standards by pointing to perceived disagreements between the two leading authorities on intellectual disability—the AAIDD and the APA. But Respondent's efforts to rest on asserted disharmony are unavailing. At the outset, Respondent ignores the most salient fact: the relevant professional organizations are entirely in agreement that the CCA's intellectual-disability framework for *Atkins* cases sharply and irreconcilably conflicts with the diagnostic framework. *See, e.g.*, AAIDD Br. 4 (Texas's approach "is wholly inconsistent with accepted scientific standards. Deviating from the basic clinical framework of the definition inevitably leads to inaccurate and unreliable results, and protects only a sub-set of defendants with intellectual disability"); APA Br. 6 (Texas's "divergences from the professional consensus of the mental health professions on the diagnosis of intellectual disability create[] an extraordinary risk that persons with intellectual disability will be executed").[6] Respondent (at 28-29) points to three areas of purported disagreement. But Respondent's claims fall short: on one

---

[6] *See also, e.g.*, APA Br. 6 (*Briseno* factors "are unsupported by any scientific or medical evidence and inconsistent with the professional standards used by mental health professionals to diagnose intellectual disability."); AAIDD Br. 29-30 (*Briseno* factors are "fundamentally inconsistent with the clinical understanding of intellectual disability"); APA Br. 5 ("As the scientific and medical knowledge in the area of mental health have evolved and advanced, so have the diagnostic standards adopted and utilized by the mental health professions."); AAIDD Br. 3 (same).

(relatedness), it seeks to manufacture conflict where there is none;[7] on another (adaptive-deficit measurement), it also erroneously claims discord;[8] and, on the third (age of onset), it raises an issue that is of no significance in this case and that will rarely, if ever, be of consequence.[9] As this Court has recognized, "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Hall*, 134 S. Ct. at 1193. Respondent's wide-ranging criticisms of these professional organizations—like the CCA's repeatedly expressed view that medical standards are "exceedingly subjective"—provide no sound basis for rejecting "the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000.[10]

---

[7] *See infra*, 20-21.

[8] Respondent argues the AAIDD establishes adaptive-behavior limitations through standardized measures two standard deviations below the mean, while the DSM-5 lacks a specific performance threshold. But there is no actual conflict: the DSM-5 states that standardized measures should be used "to the extent possible" and interpreted consistent with clinical judgment. DSM-5, 37.

[9] Respondent points to "before age 18" (AAIDD) and "the developmental period" (DSM-5), but identifies no significant clinical difference.

[10] Respondent (at 29-30) also emphasizes an AAIDD letter to the APA. Respondent overlooks that the letter sought to ensure that the organizations remained in accord on core points of definitional guidance (and they have) and also ignores that the APA made revisions to several areas in response (*e.g.*, the DSM-5 included two standard deviations below the mean in its diagnostic criteria on the first prong). Most fundamentally, robust public debate in consideration of new standards reflects important medical dialogue and does not undermine the role of medical standards.

ARGUMENT

With an understanding of the CCA's decisions as written and applied, it is clear that the CCA's decision is not "informed by the medical community's diagnostic framework." In urging a contrary view, Respondent principally maintains (at 36-37) that *Briseno*'s definition of intellectual disability is "consistent" with current clinical definitions because it uses the established three criteria. But that definitional consistency is not in dispute. *See* Pet. Br. 32 ("The three essential elements of intellectual disability—limitations in intellectual functioning, limitations in adaptive functioning, and early age of onset—have remained consistent."). Instead, the issue here, as in *Hall*, is how Texas's definition of intellectual disability is interpreted and applied. *See Hall*, 134 S. Ct. at 1994 (emphasizing that it is not enough to have a definition of intellectual disability that "*could be* interpreted consistently with *Atkins*") (emphasis added). And that is where Respondent's argument fundamentally fails. The problems with the CCA's prohibition of current medical standards—and the clinically unsound approach it has mandated instead—are clear in its interpretation of both the intellectual-functioning and adaptive-behavior prongs.[11]

---

[11] Respondent's emphasis (at 33-34 & n.22) on the CCA's grant of relief in some *Atkins* cases ignores that, in almost all of the cited cases, either the State did not oppose *Atkins* relief, the State's expert agreed the claimant was intellectually disabled, or the State chose not to produce expert testimony to rebut the claimant's showing. *See, e.g., Ex parte Smith*, No. AP-76906, 2012 WL 5450895, at *1 (Tex. Crim. App. Nov. 7, 2012). And, of course, granting relief in selected cases does not alleviate the

I. The CCA's Interpretation of Intellectual Functioning Is Inconsistent with the Medical Community's Diagnostic Framework

As this Court has explained, "established medical practice" recognizes both that IQ scores are not "final and conclusive evidence of a defendant's intellectual capacity" and that IQ scores are "imprecise" and require a standard error of measurement ("SEM"). *Hall*, 134 S. Ct. at 1995. While these points previously have been part of clinical standards, the current diagnostic framework, including the DSM-5, gives them heightened emphasis. *See, e.g.*, DSM-5, 33-37; *Hall*, 134 S. Ct. at 1994-95 (citing DSM-5). Indeed, two of Petitioner's experts stressed these points about the current medical standards in their testimony. *See, e.g.*, JA9, JA27-28 (Borda); JA114 (Greenspan).

The CCA's analysis here sharply conflicts with the diagnostic framework for analyzing intellectual functioning in two fundamental respects.

First, without any clinical justification, the CCA jettisoned the low end of the SEM of Petitioner's IQ score of 74 based on Petitioner's "history of academic failure," and the fact that "he was on death row and facing the prospect of execution" and had "exhibited withdrawn and depressive behavior." Pet. App. 75a. As Petitioner previously established, both are deeply problematic reasons to disregard the low end of the SEM for *Atkins* claimants, as such individuals will generally have a history of academic failure and all

---

CCA's responsibility to provide constitutionally sound adjudications in *all* cases.

will be confined to the depressive environment of death row. Pet. Br. 38-39. While Respondent (at 41-42) attempts to defend the CCA's reasoning, the contrast between the CCA's attempted justifications and those in a decision relied on by Respondent are stark. *See Ledford v. Warden*, 818 F.3d 600, 641 (11th Cir. 2016) (district court did not clearly err in disregarding low end of IQ scores of 77 and 79 where defendant had "sophisticated knowledge of historical and cultural facts suggest[ing] that he was not intellectually disabled" and verbal IQ score of 86).[12]

Second, the CCA held that Petitioner's purported failure of proof on IQ scores was itself sufficient to deny Petitioner's intellectual-disability claim. *See* Pet. App. 75a; Pet. Br. 36-37. In light of Petitioner's IQ score of 74, however, the CCA could not simply conclude that Petitioner had "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning." Pet. App. 63a. Instead, it was required to consider evidence of his adaptive deficits in conjunction with the claimed intellectual deficits. *See Hall*, 134 S. Ct. at 1996 ("For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would

---

[12] The CCA's reasons for disregarding the low end of Petitioner's IQ score of 78 are similarly problematic and non-clinical. Pet. App. 74a. Among other things, the CCA erroneously used risk factors for intellectual disability—evidence that Moore was "traumatized by paternal violence," was "referred for testing due to withdrawn behavior," and had an "impoverished" background—as well as Moore's race ("minority cultural background"), to determine that he should not receive the low end of the SEM. *Id.*

consider factors indicating whether the person had deficits in adaptive functioning."). Respondent's contrary view (at 43-44) simply cannot be reconciled with the clinical understanding that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Hall*, 134 S. Ct. at 2001. Accordingly, the CCA's treatment of Petitioner's IQ scores as independently dispositive of the intellectual-disability inquiry—where one of his credited scores was a 74—lacks medical justification and conflicts with this Court's precedent.[13]

II. The CCA's Interpretation of Adaptive Behavior Is Inconsistent with the Medical Community's Diagnostic Framework

The CCA's interpretation of adaptive behavior likewise fundamentally conflicts with the medical community's diagnostic framework through (1) its weighing of purported strengths against adaptive deficits, (2) its use of the non-medical *Briseno* "factors," and (3) its novel and distorted standard for "relatedness" in which a defendant must establish that adaptive deficits were caused by intellectual deficits and eliminate other possible contributing causes. Here too, while the diagnostic framework has long recognized the problems with this approach, the conflicts are now particularly pronounced in light of the

---

[13] Although the CCA proceeded to analyze Moore's adaptive functioning, it did so in the alternative, Pet. App. 75a—only after wrongly concluding that Moore had failed to satisfy the intellectual-functioning prong (*id.* at 63a) and without considering the IQ scores and adaptive deficits as "a conjunctive and interrelated assessment." *Hall*, 134 S. Ct. at 2001.

heightened emphasis that current standards place on adaptive deficits. *See, e.g.*, DSM-5, 37; JA9, 28, 114.

A. The CCA Weighed Purported Strengths Against Adaptive Deficits

The clear and unequivocal clinical consensus provides that an individual's strengths may not be weighed against deficits in determining whether the individual meets the second criterion of the intellectual disability definition. *See* Pet. Br. 39-43; AAIDD Br. 19 ("Clinical diagnostic standards focus exclusively on *deficits* in adaptive functioning because practically every individual who has intellectual disability also has things that he or she has learned to do, and can do"); APA Br. 13 ("Importantly, mental health professionals agree that intellectual disability can and should be diagnosed where there are sufficient *deficits* in adaptive functioning. That remains true even if the individual has relative strengths in other areas. The presence of relative strengths in some spheres of behavior is *not* evidence that a person does *not* have intellectual disability."); *see also* Pet. App. 123a n.17 (Alcala, J., dissenting).

In conflict with this clinical consensus, the CCA weighed Petitioner's supposed "adaptive skills"—*e.g.*, his stay "in the back of a pool hall" and "evidence that he had played pool and mowed lawns for money"—against Petitioner's manifest limitations in academic skills and social interactions (and completely ignored other significant deficits credited by the trial court). Pet. App. 80a, 88a. By dismissing Petitioner's serious deficits based upon his alleged strengths, the CCA's analysis of adaptive functioning

flagrantly violated clinical consensus on this fundamental inquiry.

Respondent attempts to side-step the CCA's problematic approach by arguing that the CCA's weighing of strengths and deficits was largely done in the context of discussing the State's expert testimony. Resp. Br. 46. But courts must evaluate expert testimony pursuant to a legally sound framework. Here, the CCA announced at the outset of its decision that "we consider *all* of the person's functional abilities, including those that show strength as well as those that show weakness," and that the trial court "erred" by not doing so (in keeping with the clinical framework). Pet. App. 11a-12a (internal quotation marks omitted). The CCA then proceeded to review the record for testimony it found indicative of Petitioner's "strengths," which it used to negate the finding of significant adaptive deficits.

This fundamental conflict with the clinical framework, unfortunately, is common in Texas *Atkins* determinations—a point repeatedly emphasized by individual CCA judges. *See, e.g.*, *Ex parte Butler*, 416 S.W.3d 863, 883 (Tex. Crim. App. 2012) (Price, J., joined by Johnson, J., dissenting) (*Atkins* denial erroneous because it "focused inordinately on the applicant's relative *strengths* rather than ruling out manifest weaknesses in at least two adaptive skills areas"; "this emphasis on adaptive strengths rather than adaptive weaknesses runs contrary to standard diagnostic protocol"). Ultimately, through what one judge called the CCA's "scattershot approach to adaptive deficits," the CCA creates the profound risk that defendants meeting the clinical definition of intellectual disability will "be executed simply because they demonstrate a few pronounced adaptive strengths

along with their manifest adaptive deficits." *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *40 (Tex. Crim. App. May 5, 2010) (Price, J., joined by Johnson and Holcomb, JJ., concurring and dissenting). Such a result is constitutionally untenable, and is exactly what occurred in this case as the result of the CCA's conflict with the diagnostic framework.

B. The CCA Relied Heavily On Its Non-Medical *Briseno* Factors

The CCA also has sharply deviated from the current clinical framework—in this case and in others—through use of the non-clinical *Briseno* "factors" in considering adaptive deficits. Pet. Br. 49-59. Presumably cognizant of the problematic nature of these non-diagnostic judge-made factors, Respondent makes several failed attempts to minimize their impact.

First, as noted, Respondent argues (at 52) that the *Briseno* factors "are purely an optional suggestion." Yet actual practice has shown that these factors are not optional. The CCA decision rejected an intellectual-disability determination solely because it failed to consider a *Briseno* factor (*Sosa*, *supra*), and the supposedly optional nature of the factors is belied by the many cases—like this one—in which they were used to deny *Atkins* relief.[14] To the extent use of the

---

[14] *See, e.g.*, *Ex parte Chester*, No. AP-75037, 2007 WL 602607, at *4 (Tex. Crim. App. Feb. 28, 2007) (affirming denial of *Atkins* relief where "[t]he trial court's findings addressed all seven evidentiary factors listed in *Briseno*"); *Butler*, 416 S.W.3d at 875-876 (Cochran, J., concurring); *Ex parte Woods*, 296 S.W.3d 587, 610-613 (Tex. Crim. App. 2009); *Taylor*, No. WR-48498-02, 2006 WL 234854, at *3 (Johnson, J., concurring); *Ex*

Briseno factors is "optional," it is arbitrary and unpredictable. And although Respondent contends the CCA's consideration of the *Briseno* factors in this case demonstrates "their optional nature and limited purpose," Resp. Br. 52-53, the exact opposite is true: the CCA analyzed every *Briseno* factor, held that they "weigh[ed] heavily" against Petitioner, and rejected the trial court's decision not to consider them. *Id.* at 89a-91a, 161a-162a. Such an approach is far from "attenuated and extraneous." Resp. Br. 53.

Second, Respondent argues that the *Briseno* factors "are a legitimate tool developed to help courts implement *Atkins*," contending that the *Briseno* factors "track specific applications of this Court's precedents regarding *Atkins* claims." *Id.* at 53-55. Not so. In *Atkins*, this Court adopted a categorical rule against executing the intellectually disabled, and did so against the backdrop of States whose own categorical rules "generally conform[ed] to the clinical definition" of intellectual disability. 536 U.S. at 317-319 & n.22. Although this Court highlighted "characteristics" of the intellectually disabled and explained why those "deficiencies" warranted exemption from execution, it did not suggest that an individual's ability to qualify for Eighth Amendment protection is dependent upon his ability to prove each of those characteristics in his individual case; the Court ruled on the intellectually disabled as a category. Nor can this Court's decisions in *Hall* and *Brumfield*—which explicitly relied on clinical criteria—be construed as "endors[ing] th[e] sort of

---

parte Wilson, No. 62490-B, slip op., 4-8 (252nd D. Ct. Jefferson Cty. Tex. Aug. 31, 2004), *aff'd*, WR-46,928-02 (Tex. Crim. App. Nov. 10, 2004) (per curiam).

inquiry" the *Briseno* factors create, Resp. Br. 53-55, which is grounded in lay stereotypes and skepticism of medical standards as "exceedingly subjective." *Briseno*, 135 S.W.3d at 8.

At bottom, the *Briseno* factors reflect the CCA's decision to supplant the diagnostic framework on adaptive deficits with its own non-diagnostic factors in order to limit the scope of Eighth Amendment protection to a subset of the intellectually disabled. *Cf. Sosa*, 364 S.W.3d at 891. The *Briseno* factors act to provide factfinders in Texas with "a certain amorphous latitude . . . to supply the normative judgment—to say, in essence, what mental retardation *means* in Texas (and, indeed, in the individual case) for Eighth Amendment purposes." *Lizcano*, 2010 WL 1817772, at *35 (Price, J., joined by Johnson and Holcomb, JJ., concurring and dissenting).[15] The *Briseno* factors simply cannot be reconciled with this Court's precedent or the Eighth Amendment. *See Hall*, 134 S. Ct. at 1999 ("those persons who meet

---

[15] *See, e.g., Ex parte Thomas*, W86-85539-M(B), slip op., 52 (194th D. Ct. Dallas Cty. Tex. Sept. 30, 2006) ("Assuming for purposes of argument that applicant is mildly mentally retarded, the Court finds that the facts of this case do not diminish applicant's personal culpability such that he should be excluded from the death penalty."), *adopted*, No. WR-16556-04, 2006 WL 3692644 (Tex. Crim. App. Dec. 13, 2006) (per curiam); *Ex parte Mathis*, WR-50,772-03, slip op., 24 (268th D. Ct. Fort Bend Cty. Tex. Jan. 4, 2006) ("Even if Applicant had established by a preponderance of the evidence that he met the psychological definition of mental retardation, Applicant has failed to establish that those mental deficiencies diminished his moral culpability for his crimes. Consequently, Applicant has failed to establish that due to his alleged mental deficiencies his sentence amounted to cruel and unusual punishment . . . "), *adopted*, 2006 WL 2706745 (Tex. Crim. App. Sept. 20, 2006) (per curiam).

the clinical definitions of intellectual disability by definition . . . bear diminish[ed] . . . personal culpability" and cannot be executed) (quoting *Atkins*, 536 U.S. at 318) (internal quotation marks omitted).

C. The CCA Required Proof of "Relatedness" In the Form of a Causal Link Between Intellectual Deficits and Adaptive Deficits

The CCA also conspicuously violates the medical community's current diagnostic framework by requiring *Atkins* claimants to prove that adaptive deficits were caused solely by intellectual deficits. Pet. App. 10a; Pet. Br. 43-46. It held that Petitioner's intellectual-disability claim failed because he could not ex-exclude the possibility that his adaptive deficits were caused by such factors as his "history of academic failure" (which, logically, would *support*, rather than detract from, a determination of intellectual disability), "the abusive atmosphere in which he was raised" (a risk factor for intellectual disability), or co-occurring disorders (despite the clinical recognition of the frequency of comorbidity and multiple causes), notwithstanding that there is no science-based methodology for providing such proof and no science-based reason for compelling it. Pet. App. 88a-89a.

Respondent defends the CCA's causation requirement on the ground that the word "related" appears in the AAIDD (formerly AAMR) 9th edition and the DSM-5. Yet the CCA's interpretation of that language—and its seemingly arbitrary decision to

give it totemic importance here—has no clinical or medical basis.[16]

As amicus APA explains about the meaning of "related" in its DSM-5 standard, "[t]he current diagnostic criteria require *a connection* between the deficits in intellectual functioning and adaptive functioning, but that connection need only exclude the obvious limits to adaptive functioning imposed by other ailments," such as "physical disabilities that impair sensory abilities (e.g., blindness or deafness)." APA Br. 9; *accord* AAIDD Br. 23 n.26 ("the term 'related' has always required only a relatively minimal connection" and has never had a causation requirement). Respondent defends the CCA's anti-clinical approach, arguing that "[o]n this prong, . . . the 'distinct[ion] between 'a legal determination' and a 'medical diagnosis' is significant." Resp. Br. 50. There is no justification, however, for creating a causation requirement (Pet. App. 10a, 88a) that is irreconcilable with clinical consensus on comorbidities and risk factors.

By selectively and randomly requiring defendants to "prove the unprovable" to avoid execution, AAIDD Br. 24 n.26, Texas once again stands alone.

* * *

---

[16] While the CCA emphasizes the importance of "relatedness" in this case and faults the trial court for "fail[ing] to make the relatedness inquiry," Pet. App. 10a, some CCA *Atkins* decisions do not even mention (much less apply) a relatedness requirement. *See, e.g.*, *Ex parte Cathey*, 451 S.W.3d 1, 9 (Tex. Crim. App. 2014). Relatedness appears to be one of several tools selectively and arbitrarily deployed by the CCA to reject *Atkins* claims.

The evidence that Bobby James Moore is intellectually disabled is overwhelming. *See* Pet. App. 127a-203a; JA 6-17, 58-74; Pet. Br. 4-6, 10-17. At age 13, Moore still lacked a basic understanding of the days of the week, the seasons of the year, and telling time. He spent his days at school often drawing pictures because he was unable to read, write, or keep up with lessons. As the trial court concluded—applying the medical community's current diagnostic framework—Moore has significantly subaverage general intellectual functioning (as reflected in his numerous IQ test scores under 75, including one relied upon by the CCA); significant and related limitations in adaptive functioning (as evidenced by, *inter alia*, his abysmal school records and test scores; the fact that he failed first grade and received only social promotions every year thereafter; his withdrawn social behavior; his limited communication skills; and his score of 2.5 standard deviations below the mean on the State expert's adaptive-behavior test); and all of these characteristics manifested during childhood. Pet. App. 127a-203a. It was only by rejecting the medical community's diagnostic framework, and instead analyzing Petitioner's intellectual-disability claim under its fundamentally flawed *Briseno* framework—in which the low end of the IQ range was erroneously dismissed, purported strengths were given primacy, the non-clinical *Briseno* factors were "weigh[ed] heavily" and an insurmountable and clinically unsound causation requirement was imposed—that the CCA was able to conclude otherwise. Accordingly, in light of the overwhelming evidence in support of Petitioner's claim, this Court should vacate the CCA's decision and make clear that, based on the record

and decision by the trial court, the Eighth Amendment bars Petitioner's execution.[17]

In sum, the CCA reviews *Atkins* claims to ensure relief is granted only to those individuals whom it perceives as having "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseno*, 135 S.W.3d at 6. Its distorted (and often arbitrary) approach to analyzing claims of intellectual disability is irreconcilable with the medical community's diagnostic framework. No other State prohibits consideration of the current diagnostic framework or interprets the three-prong definition of intellectual disability in a similar manner—nor does Texas itself in any context other than the death penalty. Without intervention by this Court, the CCA threatens to render *Atkins* "a nullity" for many intellectually-disabled defendants in Texas (like Petitioner), and undoubtedly "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1999, 1990.

---

[17] Respondent's suggestion (at 51) that this Court should treat the CCA like a federal administrative agency entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and simply remand to give the CCA an opportunity to provide a better explanation, has no basis in this Court's precedents—and vividly illustrates an inadequate valuing of the vital Eighth Amendment issues at stake.

CONCLUSION

This Court should reverse the judgment of the Texas Court of Criminal Appeals and vacate Petitioner's death sentence.

Respectfully submitted,

Alex Blaszczuk
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

Luke Varley
601 Lexington Avenue
New York, NY 10022

Clifford M. Sloan
Counsel of Record
Lauryn K. Fraas
Donald P. Salzman
Michael A. McIntosh
Brendan B. Gants
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

October 6, 2016

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

DIRECT DIAL
(202) 371-7040
DIRECT FAX
(202) 393-5760
EMAIL ADDRESS
CLIFF.SLOAN@SKADDEN.COM

FIRM/AFFILIATE OFFICES
BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WILMINGTON
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SEOUL
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
TORONTO

October 6, 2016

Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RE: *Moore v. Texas*, No. 15-797

Pursuant to Supreme Court Rule 32.3, Petitioner proposes the following materials for lodging. The materials proposed for lodging are four opinions from Texas state trial courts, which are unavailable electronically:

- ***Ex parte Mathis***, WR-50,772-03, slip op. (268th D. Ct. Fort Bend Cty. Tex. Jan. 4, 2006)
- ***Ex parte Taylor***, No. C-297-006327-0542281-B, slip op. (297th D. Ct. Jefferson Cty. Tex. Sept. 26, 2005)
- *Ex parte* ***Thomas***, W86-85539-M(B), slip op. (194th D. Ct. Dallas Cty. Tex. Sept. 30, 2006)
- *Ex parte Wilson*, No. 62490-B, slip op. (252nd D. Ct. Jefferson Cty. Tex. Aug. 31, 2004)

Petitioner cites these decisions in his Reply Brief.

Sincerely,

Clifford M. Sloan
Counsel of Record for Petitioner

cc: Scott A. Keller
Counsel of Record for Respondent

RECEIVED
OCT - 6 2016
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG - 4 2016
CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF *AMICI CURIAE*, THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES (AAIDD), AND THE ARC OF THE UNITED STATES, IN SUPPORT OF PETITIONER

JAMES W. ELLIS
Counsel of Record
ANN M. DELPHA
CAROL M. SUZUKI
STEVEN K. HOMER
DAVID J. STOUT
APRIL LAND
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-2146
ellis@law.unm.edu

Counsel for Amici Curiae

August 4, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Clinical Requirement of Adaptive Deficits 7

A. Stereotypes About People with Intellectual Disability 9

B. The Diagnostic Focus on Deficits 14

C. Co-morbidity with Other Conditions 20

D. Clinical Judgment 24

II. States Are Not Free to Ignore Accepted Scientific Standards in Adjudicating Cases Involving Intellectual Disability 27

CONCLUSION 33

TABLE OF AUTHORITIES

Federal Cases

Atkins v. Virginia, 536 U.S. 304 (2002) ..... *passim*

Brumfield v. Cain, 135 S. Ct. 2269 (2015) 18, 22

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 1

Graham v. Florida, 560 U.S. 48 (2010) 27

Hall v. Florida, 134 S. Ct. 1986 (2014) ..... *passim*

Miller v. Alabama, 132 S. Ct. 2455 (2012) 27

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) 22

Roper v. Simmons, 543 U.S. 551 (2005) 33

Skipper v. South Carolina, 476 U.S. 1 (1986) 16

State Cases

Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) 28, 29, 31

Ex parte Cathey, 451 S.W.3d 1 (Tex. Crim. App. 2014) 16, 17, 30

Ex parte Moore, 470 S.W.3d 481 (Tex. Crim. App. 2015) 16, 17, 29

Ex parte Sosa, 364 S.W.3d 889 (Tex. Crim. App. 2012) 30, 31

Statutes

Act of May 22, 1929, No. 281, § 1, 1929 Mich. Pub. Acts 689 11

Tex. Health & Safety Code Ann. § 593.005 (West 2010 & Supp. 2016) 30

Rules

Fed. R. Evid. 403 31

Other Authorities

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ..... *passim*

American Association on Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* (2012) 12, 15, 31–32

American Association on Mental Deficiency, *Classification in Mental Retardation* (rev. ed. 1983) 14

American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* (rev. ed. 1973) 7, 14, 23

American Association on Mental Deficiency, *A Manual on Terminology and Classification in Mental Retardation* (2d ed. 1961) 14

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) 18, 22

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 10–11, 14, 18, 23

American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, *Standards for Educational and Psychological Testing* (2014) 25

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ..... *passim*

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000) 22

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987) 14

American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 57 Am. Psychologist 1060 (2002) 26

American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* (John W. Jacobson & James A. Mulick eds., 1996) 14

American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68 Am. Psychologist 7 (2013) 26

Anastasi, Anne & Susana Urbina, *Psychological Testing* (7th ed. 1997) 7

Boccaccini, Marcus T., John W. Clark, Lisa Kan, Beth Caillouet & Ramona M. Noland, *Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases*, 34 Law & Psychology Rev. 1 (2010) 12

Charlot, Lauren, Sherm Fox, Van R. Silka, Anne D. Hurley, Michael A. Lowry & Robert Pary, *Mood Disorders*, in *Diagnostic Manual–Intellectual Disability: A Textbook of Diagnosis of Mental Disorders in Persons with Intellectual Disability* 271 (Robert Fletcher et al. eds., 2007)..... 21

Dosen, Anton & Jan J. M. Gielen, *Depression in Persons with Mental Retardation: Assessment and Diagnosis*, in *Mental Health Aspects of Mental Retardation: Progress in Assessment and Treatment* 70 (Robert J. Fletcher & Anton Dosen eds., 1993)..... 21

Everington, Caroline, Gilbert S. Macvaugh III, Karen L. Salekin & Timothy J. Derning, *Challenges in the Assessment of Adaptive Behavior of People Who Are Incarcerated*, in *The Death Penalty and Intellectual Disability* 201 (Edward A. Polloway ed., 2015).... 16

Everington, Caroline, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill Rts. J. 467 (2014) 19, 31

Hartley, Sigan L. & William E. MacLean, Jr., *Depression in Adults with Mild Intellectual Disability: Role of Stress, Attributions, and Coping*, 114 Am. J. Intellectual & Developmental Disabilities 147 (2009)..... 21

Kersh, Joanne, *Attitudes About People with Intellectual Disabilities: Current Status and New Directions*, in 41 *International Review of Research in Developmental Disabilities* 199 (Robert M. Hodapp ed., 2011) 12

Lyon, Andrea D., *But He Doesn't* Look *Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia*, 57 DePaul L. Rev. 701 (2008) 12

Macvaugh, Gilbert S. III & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131 (2009) 10, 13, 15, 17, 26, 31

Mank, David, *Employment*, in *Handbook of Developmental Disabilities* 390 (Samuel L. Odom et al. eds., 2007) 13

Nihira, Kazuo, *Adaptive Behavior: A Historical Overview*, in *Adaptive Behavior and Its Measurement: Implications for the Field of Mental Retardation* 7 (Robert L. Schalock ed., 1999) 7

Olley, J. Gregory, *The Death Penalty, the Courts, and Intellectual Disabilities*, in *The Handbook of High-Risk Challenging Behaviors in People with Intellectual and Developmental Disabilities* 229 (James K. Luiselli ed., 2012)..... 11, 19, 20, 22–23

Olley, J. Gregory & Ann W. Cox, *Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System–II*, in *Adaptive Behavior Assessment System–II: Clinical Use and Interpretation* 381 (Thomas Oakland & Patti L. Harrison eds., 2008) 16–17

Reschly, Daniel J., *Documenting the Developmental Origins of Mild Mental Retardation*, 16 Applied Neuropsychology 124 (2009) 9, 12–13

Ryan, Ruth, *Posttraumatic Stress Disorder in Persons with Developmental Disabilities*, 30 Community Mental Health J. 45 (1994)..... 22

Schalock, Robert L. & Ruth Luckasson, *Clinical Judgment* (2d ed. 2014)..... 14, 25, 26

Siperstein, Gary N. & Melissa A. Collins, *Intellectual Disability*, in *The Death Penalty and Intellectual Disability* 21 (Edward A. Polloway ed., 2015)..... 13

Snell, Martha E. & Ruth Luckasson, with Sharon Borthwick-Duffy, Val Bradley, Will H. E. Buntinx, David L. Coulter, Ellis (Pat) M. Craig, Sharon C. Gomez, Yves Lachapelle, Alya Reeve, Robert L. Schalock, Karrie A. Shogren, Scott Spreat, Marc J. Tassé, James R. Thompson, Miguel A. Verdugo, Michael A. Wehmeyer & Mark H. Yeager, *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 Intellectual & Developmental Disabilities 220 (2009) 10, 11, 13, 18

Stancliffe, Roger J. & K. Charlie Lakin, *Independent Living*, in *Handbook of Developmental Disabilities* 429 (Samuel L. Odom et al. eds., 2007) 13

Stavrakaki, Chrissoula & Yona Lunsky, *Depression, Anxiety, and Adjustment Disorders in People with Intellectual Disabilities*, in *Psychiatric and Behavioural Disorders in Intellectual and Developmental Disabilities* 113 (Nick Bouras & Geraldine Holt eds., 2d ed. 2007) 22

Szymanski, Ludwik S. & Maija Wilska, *Childhood Disorders: Mental Retardation*, in 1 *Psychiatry* 687 (Allan Tasman et al. eds., 2d ed. 2003) 22

Tassé, Marc J., *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114 (2009) 10, 16, 25

Tomasulo, Daniel J. & Nancy J. Razza, *Posttraumatic Stress Disorder*, in *Diagnostic Manual–Intellectual Disability: A Textbook of Diagnosis of Mental Disorders in Persons with Intellectual Disability* 365 (Robert Fletcher et al. eds., 2007) 21

Trent, James W., Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* (1994) 11

Wehmeyer, Michael L. & Susan B. Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three-Years After High School: The Impact of Self-Determination*, 38 Education & Training in Developmental Disabilities 131 (2003) 13–14

Widaman, Keith F., *Concepts of Measurement*, in *The Death Penalty and Intellectual Disability* 55, (Edward A. Polloway ed., 2015) 25

Widaman, Keith F. & Kevin S. McGrew, *The Structure of Adaptive Behavior*, in American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 97 (John W. Jacobson & James A. Mulick eds., 1996) 8

INTEREST OF *AMICI*[1]

Amici are scientific, clinical, and voluntary organizations in the field of intellectual disability.

THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES ("AAIDD") (formerly named the American Association on Mental Retardation), founded in 1876, is the nation's oldest and largest organization of professionals in the field of intellectual disability. Through its professional journals, conferences, and book publishing, AAIDD works diligently to advance scientific understanding of intellectual disability. Primarily focused on clinical, psychological, scientific, educational, and habilitative issues, the Association also has a longstanding interest in legal issues that affect the lives of people with intellectual disability. AAIDD has appeared as *amicus curiae* in this Court in a variety of cases involving mental disability, including cases as diverse as *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Atkins v. Virginia*, 536 U.S. 304 (2002). AAIDD has

---

[1] This brief was written entirely by counsel for *amici*, as listed on the cover. No counsel for either party authored this brief in whole or in part, and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the members of the organizational *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed notices of consent to the filing of *amicus curiae* briefs in support of either party, or neither party, with the Clerk's Office.

formulated the most widely accepted clinical definition of intellectual disability. Both as the formulator of the clinical definition of intellectual disability, and as an interdisciplinary membership organization concerned with maintaining appropriate professional standards in the diagnosis of intellectual disability, AAIDD and its members have a strong interest in the manner in which *Atkins* claims are evaluated by courts.

THE ARC OF THE UNITED STATES ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities and consists of nearly 700 state and local chapters across the country. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. Through its National Center on Criminal Justice and Disability, The Arc serves as a national clearinghouse for information, training, and advocacy on the topic of people with intellectual and developmental disabilities involved in the criminal justice system. The Arc has a vital interest in ensuring that all individuals with intellectual and developmental disabilities receive the protections and supports to which they are entitled by law, and that courts and administrative agencies employ commonly accepted scientific principles for the diagnosis of intellectual and developmental disabilities. The Arc has appeared as *amicus curiae* in this Court in a variety of cases involving intellectual and developmental

disabilities, including *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 134 S. Ct. 1986 (2014).

SUMMARY OF ARGUMENT

As with any field of scientific inquiry, our understanding of the condition of intellectual disability is improved and enhanced over time by continuing, rigorous study and analysis. The scientific study and the diagnosis of intellectual disability involve issues important to scholars and clinicians. But *amici* believe that there is no need for this Court to become enmeshed in the details and intricacies of those scholarly efforts in order to resolve the instant case and to provide guidance to lower courts in their task of fairly adjudicating cases under *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court need only affirm that States must conform to the basic framework of the *clinical* definition of intellectual disability.

The clinical definition of intellectual disability consists of three prongs.[2] The first prong requires impairment in intellectual functioning. This Court made clear in *Hall v. Florida*, 134 S. Ct. 1986 (2014), that States cannot artificially ration the number of *Atkins*-eligible capital defendants by arbitrarily rejecting universally accepted scientific principles in evaluating test scores.

---

[2] The third prong of the definition, regarding the age of onset, is not at issue in this case.

The second prong requires deficits in adaptive behavior. As the Court observed in *Hall*, "Intellectual disability is a condition, not a number." 134 S. Ct. at 2001. Although the precise clinical terminology has evolved over time, the core principles about the interpretation of adaptive deficits have been well settled among clinicians for decades. Central to this clinical consensus is agreement that the inquiry must focus on *deficits* in adaptive skills, and not some form of "balancing" those deficits with supposed strengths that an individual might appear to possess. Equally well accepted is the fact that many individuals with intellectual disability may also have other conditions or disabilities (known as "co-morbidity" or "dual diagnosis") and those other conditions do not affect the diagnosis of intellectual disability.

Texas has distorted the clinical definition's carefully crafted and scientifically tested requirements for the second prong. It has devised a formula of exclusionary "factors," a formula that rests heavily on stereotypes about people with intellectual disability. This approach is wholly inconsistent with accepted scientific standards. Deviating from the basic clinical framework of the definition inevitably leads to inaccurate and unreliable results, and protects only a sub-set of defendants with intellectual disability.

This deliberate decision to reject clinical standards in the adjudication of death penalty cases is inconsistent with this Court's holdings, and incompatible with the Eighth Amendment.

ARGUMENT

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids the execution of any individuals who fall within the clinical definition of intellectual disability (or, previously, "mental retardation").[3] "Because of their impairments, . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 536 U.S. at 318.[4]

The clinical definition of intellectual disability consists of three requirements: reduced intellectual functioning (as measured by IQ testing), deficits in adaptive skills, and onset of the disability before adulthood.[5] In *Hall v. Florida*, this Court addressed

---

[3] This Court has noted the change in terminology from "mental retardation" to "intellectual disability." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

[4] *See also Hall*, 134 S. Ct. at 1992 ("No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity . . . ." (citation omitted)).

[5] American Association on Intellectual and Developmental Disabilities (AAIDD), *Intellectual Disability: Definition, Classification, and Systems of Supports* 5 (11th ed. 2010) [hereinafter AAIDD, *Manual 2010*] ("Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed

the implementation of the definition's first prong—the requirement of significant limitations in intellectual functioning—and noted that the clinical definition of intellectual disability is "a fundamental premise of *Atkins*." 134 S. Ct. 1986, 1999 (2014).[6]

This case involves the second prong of the definition: the diagnostic requirement that an individual have "significant limitations . . . in adaptive behavior."[7]

---

in conceptual, social, and practical adaptive skills. This disability originates before age 18."); *see also* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) [hereinafter *DSM-5*] ("Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.").

[6] In the present case, the expert testimony makes clear that Petitioner satisfies the first prong of the definition, Joint Appendix at 17, 39, 73, 89, and the judge who heard the testimony so found. Petitioner's Appendix at 167a.

[7] AAIDD, *Manual 2010*, *supra* note 5, at 5. Over the years, the precise language used by professionals in the field to describe the adaptive behavior (sometimes abbreviated as AB) prong has varied somewhat, reflecting advances in clinical understanding and practices. But these changes in terminology have not affected the concept of adaptive behavior or altered the category of individuals who are found to have significant deficits. *See id.* at 11 ("[B]oth the definition of ID [intellectual disability] and its operationalization have remained consistent over time."). State statutes also vary somewhat in their terminology regarding adaptive behavior, having been adopted at different times and incorporating language derived from different iterations of the definition. All of these statutory definitions are grounded in clinical understanding, and encompass the same set of individuals.

There is a substantial, consistent, and robust body of clinical and scientific literature on the meaning and application of this requirement. Accurate and valid diagnoses must be informed by that clinical understanding.

I. The Clinical Requirement of Adaptive Deficits.

For decades, the clinical definition of intellectual disability has required a determination that the individual has, in addition to limitations in intellectual functioning, deficits in adaptive functioning.[8] This requirement reflects the consensus among clinicians and professional organizations in the field that "intellectual limitation is a necessary but not a sufficient condition for mental retardation." Anne Anastasi & Susana Urbina, *Psychological Testing* 248 (7th ed. 1997). The purpose of this component of the definition is to exclude from the diagnosis any individual whose low scores on IQ testing is not accompanied by a substantially disabling impairment of functioning in

---

[8] *See, e.g.*, American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* 11 (rev. ed. 1973) ("Mental Retardation refers to significantly subaverage general intellectual functioning *existing concurrently with deficits in adaptive behavior*, and manifested during the developmental period." (emphasis added)). For a discussion on the evolution of the adaptive behavior component, see Kazuo Nihira, *Adaptive Behavior: A Historical Overview*, in *Adaptive Behavior and Its Measurement: Implications for the Field of Mental Retardation* 7, 7–14 (Robert L. Schalock ed., 1999).

life.[9] Put another way, the adaptive behavior requirement is designed to restrict the diagnosis of intellectual disability to those individuals who, in addition to their low IQ scores, also have an actual, significant disability that affects their lives and reduces their ability to function in society. *See Hall*, 134 S. Ct. at 1999 (These individuals have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in

---

[9] *See generally* AAIDD, *Manual 2010*, *supra* note 5, at 43 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."). The American Psychiatric Association's classification manual similarly requires:

> [d]eficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

DSM-5, *supra* note 5, at 33. The American Psychological Association recognizes the same diagnostic requirement. *See* Keith F. Widaman & Kevin S. McGrew, *The Structure of Adaptive Behavior*, in American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 97, 97 (John W. Jacobson & James A. Mulick eds., 1996) ("To be identified as having [mental retardation], a person must exhibit both significantly subaverage intelligence and deficits in adaptive behavior during the developmental period."); *id.* ("Adaptive behaviors are the behavioral skills that people typically exhibit when dealing with the environmental demands they confront.").

logical reasoning, to control impulses, and to understand the reactions of others." (quoting *Atkins*, 536 U.S. at 318)). Thus, it excludes from the diagnosis of ID people who are merely poor test-takers.[10]

Decades of scientific study and clinical experience have produced a remarkable consensus on several key issues relating to the proper diagnosis of the second prong of the definition.

A. Stereotypes About People with Intellectual Disability

There is a wide gap between the clinical definition, on the one hand, and on the other, expectations that many laypeople have about what intellectual disability (or mental retardation) means. Common mis-impressions include beliefs that people with ID are essentially identical to one another, and that all are incapable of any but the most rudimentary tasks. The magnitude of that gap and its consequences can be particularly problematic. As a prominent leader in the field of intellectual disability has observed:

---

[10] *See* Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 Applied Neuropsychology 124, 132 (2009) ("Even a very low score on a single measure of general intellectual functioning is never sufficient.").

> Most individuals with mental retardation will have strengths and areas of ability. These strengths may confound a layperson or a professional with limited clinical experience with individuals who have mild mental retardation. These laypersons may erroneously interpret these pockets of strengths and skills as inconsistent with mental retardation because of their misconceptions regarding what someone with mental retardation can or cannot do.

Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009) (citation omitted).[11]

---

[11] Several authorities cited in this brief occasionally use the term "mild" intellectual disability or mental retardation as part of a mild/moderate/severe/profound taxonomy. The term "mild" encompasses roughly 85–90% of people who are within the clinical definition of ID, but almost certainly a much higher proportion of *Atkins* cases. Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 117 (2009); Gilbert S. Macvaugh III & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 142 (2009) ("virtually all" *Atkins* cases). *See generally* Martha E. Snell & Ruth Luckasson et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 Intellectual & Developmental Disabilities 220, 228 (2009). A principal reason why many clinicians no longer use these diagnostic subcategories is because the term "mild," a euphemism, can be mistakenly read to suggest that such people have only minimal impairments, and thus the term understates the extent of their deficits. *See* American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports*

Such preconceived assumptions about what it means for someone to have intellectual disability often contrast sharply with the understanding of professionals and clinicians in the field.[12] Some of these stereotyped notions are triggered by an individual's physical appearance,[13] but many are also

---

34 (9th ed. 1992). In reality, everyone within that category faces the same functional issues addressed by the Court in *Atkins* and *Hall*. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002); *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014).

12 People with intellectual disability have been confronted by popular misunderstandings and stereotypes throughout history. *See* James W. Trent, Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* 131–224 (1994). In the past, many of these stereotypes gave rise to egregious legislation, particularly at the state level. For example, a 1929 Michigan statute provided, "It is hereby declared to be the policy of the state to prevent the procreation and increase in number of feeble-minded, insane and epileptic persons, idiots, imbeciles, moral degenerates, and sexual perverts, likely to become a menace to society or wards of the state. The provisions of this act are to be liberally construed to accomplish this purpose." Act of May 22, 1929, No. 281, § 1, 1929 Mich. Pub. Acts 689, 689–90.

13 *See* J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities*, in *The Handbook of High-Risk Challenging Behaviors in People with Intellectual and Developmental Disabilities* 229, 231 (James K. Luiselli ed., 2012) ("[T]he public generally misunderstands mild ID and expects that such individuals are easy to identify by their physical appearance, their speech, or other readily apparent characteristics."); Martha E. Snell & Ruth Luckasson et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 Intellectual & Developmental Disabilities 220, 220 (2009) ("Most of these individuals [in the range of mild intellectual disability] are physically indistinguishable from the general population because no specific physical features are associated with intellectual

based on the public's often uninformed expectations about what people with intellectual disability supposedly cannot do. There is a strong impulse to conjure up our own image of what people with intellectual disability are like, and then to evaluate individuals by how closely they seem to resemble that preconceived image of "a mentally retarded person."[14]

---

disability at higher [IQ levels]."); American Association on Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* 25–26 (2012) ("Physical appearance can also contribute to stereotypes as reflected in the statement that 'if you don't have the look (as in Down syndrome) then you are not intellectually disabled.' It should be noted that the vast majority of persons with an ID have no dysmorphic feature and generally walk and talk like persons without an ID.").

[14] *See, e.g.*, Joanne Kersh, *Attitudes About People with Intellectual Disabilities: Current Status and New Directions*, in 41 *International Review of Research in Developmental Disabilities* 199, 220 (Robert M. Hodapp ed., 2011) ("Additionally, a lack of familiarity with people with ID may lead to a reliance on common misperceptions and stereotypes in order to make judgments and decisions about individuals."); Marcus T. Boccaccini et al., *Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases*, 34 Law & Psychol. Rev. 1, 18 (2010); Andrea D. Lyon, *But He Doesn't* Look *Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia*, 57 DePaul L. Rev. 701, 712 (2008) ("Many mistakenly believe that one can merely *look* at a person and tell whether he is mentally retarded.").

Stereotypes about intellectual disability are often based on images of people with more severe or profound levels of impairment than those individuals who are most frequently encountered in capital cases. *See* Daniel J. Reschly,

These lay assumptions sometimes include an imagined "list" of things that people with intellectual disability cannot do. The activities that are supposedly inconsistent with intellectual disability can involve, for example, employment, social relationships, reading and writing, and driving a car. But the clinical literature is abundantly clear that many of the people who have been properly diagnosed with intellectual disability can perform one or more of these tasks.[15]

Documenting the Developmental Origins of Mild Mental Retardation, 16 Applied Neuropsychology 124, 125 (2009) ("Death penalty appeals involving claims of MR . . . virtually always involve [mild mental retardation]."); Macvaugh & Cunningham, *supra* note 11, at 142 ("[V]irtually all [capital offenders with mental retardation] are within the mild category of mental retardation.") (The Macvaugh and Cunningham article is an outgrowth of the ad hoc committee on *Atkins* evaluations within the section of the American Psychological Association concerned with intellectual disability.).

[15] *See, e.g.*, Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 Applied Neuropsychology 124, 133 (2009); Martha E. Snell & Ruth Luckasson et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 Intellectual & Developmental Disabilities 220, 220–21 (2009); Roger J. Stancliffe & K. Charlie Lakin, *Independent Living*, in *Handbook of Developmental Disabilities* 429, 430 (Samuel L. Odom et al. eds., 2007) ("Seminal studies have documented the ability of many people with ID to live reasonably successfully in the community with relatively modest formal support . . . ." (citations omitted)); Gary N. Siperstein & Melissa A. Collins, *Intellectual Disability*, in *The Death Penalty and Intellectual Disability* 21, 26–29 (Edward A. Polloway ed., 2015); David Mank, *Employment*, in *Handbook of Developmental Disabilities* 390, 392 (Samuel L. Odom et al. eds., 2007); Michael L. Wehmeyer & Susan B. Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three-Years After High School: The*

The scholarly literature provides no support for any such exclusionary list of everyday tasks incompatible with a diagnosis of intellectual disability. Nor is there such a list in the experience of clinicians who deal with individuals with intellectual disability every day.

B. The Diagnostic Focus on Deficits

The clinical definition of adaptive behavior has long focused exclusively on adaptive *deficits*.[16] As a

---

Impact of Self-Determination, 38 Education & Training in Developmental Disabilities 131, 139–40 (2003); *see also* Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* 38–39 (2d ed. 2014).

[16] *See, e.g.*, AAIDD, *Manual 2010*, *supra* note 5, at 1 ("significant *limitations* . . . in adaptive behavior"); *DSM-5*, *supra* note 5, at 33 ("*[d]eficits* in adaptive functioning"); American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 13 (John W. Jacobson & James A. Mulick eds., 1996) ("[s]ignificant *limitations* in adaptive functioning"); American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) ("*limitations* in adaptive skills"); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 32 (3d ed. rev. 1987) ("[c]oncurrent *deficits or impairments* in adaptive functioning"); American Association on Mental Deficiency [now AAIDD], *Classification in Mental Retardation* 11 (rev. ed. 1983) ("*deficits* in adaptive behavior"); American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* 11 (rev. ed. 1973) ("existing concurrently with *deficits* in adaptive behavior"); American Association on Mental Deficiency, *A Manual on Terminology and Classification in Mental Retardation* 3 (2d ed. 1961) ("*[i]mpairment* in adaptive behavior") (emphasis added in each quotation).

result, each diagnostic evaluation explores and documents those things that an individual *cannot* do in everyday life.[17] In the absence of such practical

---

[17] Clinicians have developed sophisticated and detailed methods for objectively answering the question of what deficits or limitations an examined individual may have. These methods include, but are not limited to, psychometric instruments known as adaptive behavior scales. *See* AAIDD, *Manual 2010*, *supra* note 5, at 47 ("Obtaining information from multiple respondents and other relevant sources (e.g., school records, employment history, previous evaluations) is essential to providing corroborating information that provides a comprehensive picture of the individual's functioning."); American Association on Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* 18 (2012) ("The use of multiple respondents, consistent with this standard, will ensure greater reliability of the information obtained, and provide a broader coverage of adaptive behavior across settings."); *DSM-5*, *supra* note 5, at 37. *See generally Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014) (Evidence of AB deficits include "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.").

It is worth noting that the diagnostic assessment of deficits in adaptive functioning focuses on typical, everyday functioning, and not on potential or maximum performance. For clinicians, this is very different from the assessment of intellectual functioning (Prong 1), which assesses maximum performance. *See, e.g.*, AAIDD, *Manual 2010*, *supra* note 5, at 47 ("This is a critical distinction between the assessment of adaptive behavior and the assessment of intellectual functioning, where best or maximal performance is assessed."); Macvaugh & Cunningham, *supra* note 11, at 162 (There is a consensus among clinicians that "assessment of adaptive behavior should measure a person's typical or actual *performance*, as opposed to *knowledge* of a skill or estimated potential." (citations omitted)).

The evaluation of "everyday functioning" raises particular issues in prisons. Clinicians agree that prison behavior is not a valid measure of an individual's real-life functioning. While evidence of an inmate's successful adaptation to prison conditions *can* be probative evidence on the separate and distinct issue of future dangerousness, and therefore admissible in mitigation at capital sentencing, *see Skipper v. South Carolina*, 476 U.S. 1, 7 (1986), it is not relevant to an *Atkins* case on the issue of whether the defendant had deficits in adaptive behavior at the time of the offense. Caroline Everington et al., *Challenges in the Assessment of Adaptive Behavior of People Who Are Incarcerated*, in *The Death Penalty and Intellectual Disability* 201, 202 (Edward A. Polloway ed., 2015) ("[A] satisfactory assessment of AB [adaptive behavior] is not possible in a prison context because the individual has no opportunities to demonstrate the presence or absence of adaptive skills typical in day-to-day life. Inmates do not cook, choose clothing, or make independent choices about their day-to-day existence. By design, correctional settings remove virtually all personal control from the individual, and, as such, practical behaviors pertinent to the diagnosis cannot be demonstrated."); *DSM-5*, *supra* note 5, at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers) . . . ."); Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 119 (2009) ("The prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior."). In the case at bar, the Court of Criminal Appeals clearly mandated consideration of a defendant's "conduct in a prison society." *Ex parte Moore*, 470 S.W.3d 481, 489 (Tex. Crim. App. 2015). *See Ex parte Cathey*, 451 S.W.3d 1, 26–27 (Tex. Crim. App. 2014).

Another difficulty that arises from an assessment of prison behavior occurs when evidence is admitted in the form of testimony by guards and other correctional officers. *See, e.g.*, J. Gregory Olley & Ann W. Cox, *Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-II*, in *Adaptive Behavior Assessment System-II: Clinical Use and Interpretation* 381, 386 (Thomas Oakland &

deficits, clinicians cannot diagnose the individual as having intellectual disability. The clinician's diagnostic focus does not — and cannot — involve any form of "balancing" deficits against the abilities or strengths which the particular individual may also possess.[18]

Framing the adaptive behavior prong solely in terms of a person's limitations was not an arbitrary choice in the formulation of the definition of intellectual disability. The diagnostician's singular focus on adaptive deficits (in contrast to balancing strengths and weaknesses) might initially seem counterintuitive to many laypeople. However, this focus on deficits makes clinical sense in the diagnostic process because the second prong's function is to ascertain whether the measured

---

Patti L. Harrison eds., 2008) ("[R]eports from corrections officers or other observations of current functioning in prison are not valid indicators of level of adaptive behavior."); Macvaugh & Cunningham, *supra* note 11, at 161 ("[A]n assessment of a particular inmate's adaptive behavior while in a highly-structured prison environment has very limited correspondence to the adaptive demands of the open community, whether or not the offender's adaptation is compared with other inmates."). And the problems that have been noted, *supra* Section I.A., concerning stereotypes about people with intellectual disability often arise when correctional officers describe observed behavior as either consistent or inconsistent with their own image of the functioning of a person with intellectual disability.

[18] In sharp contrast to the medical community's "diagnostic framework," *Hall*, 134 S. Ct. at 2000, the Court of Criminal Appeals instructs lower courts to consider both strengths and weaknesses. *Moore*, 470 S.W.3d at 489. *See Cathey*, 451 S.W.3d at 27.

intellectual limitations (i.e., the first prong) are accompanied by real-world limitations in the individual's life.[19]

This focus on adaptive deficits is essential to the diagnostic process because clinicians universally recognize that, in the lives of individuals with intellectual disability, weaknesses in functioning almost always co-exist with relative strengths. As the AAIDD classification manual explains, the finding of "significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills."[20]

---

[19] *See Hall*, 134 S. Ct. at 2001 ("Intellectual disability is a *condition*, not a number." (emphasis added)).

[20] AAIDD, *Manual 2010*, *supra* note 5, at 47. This fact has long been recognized and accepted by clinicians. *See, e.g.*, American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) ("Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities . . . ."); *see also* Martha E. Snell & Ruth Luckasson et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 Intellectual & Developmental Disabilities 220, 220 (2009) ("[A]ll individuals with intellectual disability typically demonstrate strengths in functioning along with relative limitations.").

This Court has recognized this key aspect of the definition of intellectual disability. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" (quoting American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 8 (10th ed. 2002))).

Clinical diagnostic standards focus exclusively on *deficits* in adaptive functioning because practically every individual who has intellectual disability also has things that he or she has learned to do, and can do.[21] As a result, the existence of one or more adaptive strengths cannot negate a diagnosis of intellectual disability.[22] The particular functional impairments and adaptive deficits that are experienced by individuals with intellectual disability are not uniform across the class, and the

---

[21] *See, e.g.*, Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill Rts. J. 467, 471 (2014) ("Interpretation of these findings requires an understanding of typical behavioral expectations of individuals who function in the mild range of ID. For example, the presence of a defendant's strengths in some areas, such as having a history of steady employment or possessing academic skills in the fourth to sixth grade range, is to be expected and does not preclude a diagnosis of ID.").

[22] While it is often important for clinicians to identify and assess a person's strengths and skills for purposes of planning and implementing future individualized educational and habilitative programs, those strengths play no role in the *diagnostic* determination of whether the person meets the definition of intellectual disability. J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities*, in *The Handbook of High-Risk Challenging Behaviors in People with Intellectual and Developmental Disabilities* 229, 233 (James K. Luiselli ed., 2012) ("[I]t is important to note that a clinical evaluation emphasizes strengths in order to plan services that capitalize upon those strengths to promote success. An evaluation for the court is focused on deficits because its purpose is to determine a diagnosis, and an ID is, by definition, a condition characterized by deficits.").

diagnostic standards cannot, and do not, require such uniformity.[23]

This diversity among people who have intellectual disability is often unknown to laypeople with limited experience with the disability. However, it is fully documented and well known to clinicians in the field[24] and thus must form the backdrop for any legitimate diagnostic process.

C. Co-morbidity with Other Conditions

Many individuals who have intellectual disability also have other mental or physical disabilities. Co-existing conditions (sometimes referred to as "co-morbid" or "dual diagnosis") can arise in the evaluation process in some *Atkins* cases. This phenomenon has long been recognized by clinicians and mental health professionals.[25]

---

23 *See id.* ("[P]eople with mild ID are a heterogeneous group with individual profiles of relative strengths and weaknesses. One cannot argue that the presence of a particular strength rules out ID, particularly if it is a strength shared with others with ID.").

24 *See, e.g.*, AAIDD, *Manual 2010*, *supra* note 5, at 7 ("[P]eople with ID are complex human beings who likely have certain gifts as well as limitations.").

25 Under the heading of "Comorbidity," the American Psychiatric Association includes several forms of mental illness frequently encountered in individuals who have intellectual disability.

> The most common co-occurring mental and neurodevelopmental disorders are attention-deficit/hyperactivity disorder; depressive and bipolar disorders; anxiety disorders; autism spectrum disorder; stereotypic movement disorder (with or without self-injurious behavior); impulse-control disorders; and major neurocognitive disorder. Major depressive disorder may occur throughout the range of severity of intellectual disability.

DSM-5, *supra* note 5, at 40. The clinical literature about co-morbid depression in individuals with intellectual disability is well established. *See, e.g.*, Anton Dosen & Jan J. M. Gielen, *Depression in Persons with Mental Retardation: Assessment and Diagnosis*, in *Mental Health Aspects of Mental Retardation: Progress in Assessment and Treatment* 70 (Robert J. Fletcher & Anton Dosen eds., 1993); Sigan L. Hartley & William E. MacLean, Jr., *Depression in Adults with Mild Intellectual Disability: Role of Stress, Attributions, and Coping*, 114 Am. J. Intellectual & Developmental Disabilities 147 (2009); Lauren Charlot et al., *Mood Disorders*, in *Diagnostic Manual–Intellectual Disability: A Textbook of Diagnosis of Mental Disorders in Persons with Intellectual Disability* 271–316 (Robert Fletcher et al. eds., 2007).

There is also abundant clinical evidence about the heightened vulnerability of some individuals with intellectual disability to post-traumatic stress disorder (PTSD). *See, e.g.*, Daniel J. Tomasulo & Nancy J. Razza, *Posttraumatic Stress Disorder*, in *Diagnostic Manual–Intellectual Disability: A Textbook of Diagnosis of Mental Disorders in Persons with Intellectual Disability* 365, 368 (Robert Fletcher et al. eds., 2007) ("In addition to lower intellectual levels, people with ID [intellectual disabilities] have higher rates of many additional factors known to increase vulnerability to PTSD, such as early separation from parents (through early institutionalization or hospital admissions), lower educational levels, less training and preparation for negative life events (training and preparation that might have increased the individual's sense of personal control), and limited capacity for garnering social support.");

The fact that an individual who has intellectual disability also has another mental condition or mental illness does not alter the diagnostic process. In particular, co-morbidity does not preclude a clinical determination that the individual has deficits in adaptive behavior that satisfy the second prong of the definition.[26] There is

---

Ludwik S. Szymanski & Maija Wilska, *Childhood Disorders: Mental Retardation*, in 1 *Psychiatry* 687, 718 (Allan Tasman et al. eds., 2d ed. 2003); Ruth Ryan, *Posttraumatic Stress Disorder in Persons with Developmental Disabilities*, 30 Community Mental Health J. 45, 46 (1994) ("People with developmental disabilities are more likely than nondisabled persons to be abused physically, emotionally, or sexually."); Chrissoula Stavrakaki & Yona Lunsky, *Depression, Anxiety, and Adjustment Disorders in People with Intellectual Disabilities*, in *Psychiatric and Behavioural Disorders in Intellectual and Developmental Disabilities* 113, 119 (Nick Bouras & Geraldine Holt eds., 2d ed. 2007) ("One major cause of PTSD in these individuals are high rates of physical and sexual abuse.").

The phenomenon of dual diagnosis has also been noted by this Court. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 593 (1999) ("Respondents L. C. and E. W. are mentally retarded women; L. C. has also been diagnosed with schizophrenia, and E. W. with a personality disorder."); *Brumfield v. Cain*, 135 S. Ct. 2269, 2280 (2015) ("[T]he diagnosis should be made . . . regardless of and in addition to the presence of another disorder." (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 47 (4th ed. text rev. 2000)), (citing American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 172 (10th ed. 2002)).

[26] Using the possible existence of a co-morbid mental illness in an individual to alter or preclude an otherwise-valid diagnosis of intellectual disability is incompatible with accepted clinical practice. *See, e.g.*, J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities*, in *The Handbook of*

High-Risk Challenging Behaviors in People with Intellectual and Developmental Disabilities 229, 232 (James K. Luiselli ed., 2012) ("An understanding of dual diagnoses is important because it may be mistakenly argued in court that the defendant has a mental illness diagnosis that rules out mental retardation.").

In this regard, it is important to note that the definition of intellectual disability does not contain a requirement that the deficits in adaptive behavior (Prong 2) be *caused by* the deficits in intellectual functioning (Prong 1). *See, e.g.*, AAIDD, *Manual 2010*, *supra* note 5, at 1 ("Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior . . . ."); *DSM-5*, *supra* note 5, at 33 ("Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."). Nor have earlier iterations of the definition contained a requirement of *causation* between the first and second prongs. *See, e.g.*, American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* 11 (rev. ed. 1973) ("Mental Retardation refers to significantly subaverage general intellectual functioning *existing concurrently* with deficits in adaptive behavior, and manifested during the developmental period." (emphasis added)).

Although no formulation of the definition has ever required proof that the intellectual impairment caused the deficits in adaptive functioning, some versions have used the term "related" in reference to the two prongs. *See DSM-5*, *supra* note 5, at 38 ("[T]he deficits in adaptive functioning must be directly related to the intellectual impairments . . . ."); American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) ("existing concurrently with related limitations in . . . adaptive skill areas . . . ."). But when it has been included, the term "related" has always required only a relatively minimal connection. *Id.* at 6 ("The limitations in adaptive skills are more closely related to the intellectual

no reason, nor do we have a methodology, to somehow "separate out" the effects of multiple conditions. Neither the accuracy nor the consistency of *Atkins* adjudications are enhanced by inviting witnesses — or triers of fact — to *guess* about the causation of a defendant's established deficits in adaptive behavior.

D. Clinical Judgment

Intellectual disability is a complex condition, and an accurate clinical diagnostic process cannot be limited to psychometric instruments alone. Evaluating an individual who may have intellectual disability involves more than technical details: the clinical experts must also be given latitude to exercise and explain the role of their professional

---

limitation than to some other circumstances such as cultural or linguistic diversity or sensory limitation.").

A central reason that the diagnostic criteria have never included a requirement of demonstrating causation is that clinicians have never possessed instruments or a scientifically based methodology for ascertaining whether the one phenomenon is caused by the other. As a result, there can be no scientific basis for a court (or a witness) to reach a diagnostic conclusion that a defendant's deficits in adaptive functioning were *caused by* the existence of a mental illness (rather than having been caused by the deficits in intellectual functioning). Such a conclusion is scientifically unsupported and unsupportable. Placing the burden of proof on an intellectually impaired individual to demonstrate that his adaptive deficits were caused by his intellectual impairment would require him to prove the unprovable.

judgment[27] in reaching their conclusions.[28] Under professional standards, diagnosticians are not free to replace the requirements of the clinical definition with their own impressionistic views.[29] It is essential that the clinician's judgment rests on an empirical and fully documented assessment.[30]

---

[27] Keith F. Widaman, *Concepts of Measurement*, in *The Death Penalty and Intellectual Disability* 55, 59 (Edward A. Polloway ed., 2015) ("[T]he need for clinical judgment to combine all information to arrive at important diagnostic decisions is always a component of this assessment task."); Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* 7 (2d. ed. 2014) ("The purpose of clinical judgment is to enhance the quality, validity, and precision of the clinician's decision or recommendation in situations related to diagnosis, classification, and planning supports.").

[28] *See also* American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 164 (2014) ("Test score interpretation requires professionally responsible judgment that is exercised within the boundaries of knowledge and skill afforded by the professional's education, training, and supervised experience as well as the context in which the assessment is being performed."); *DSM-5*, *supra* note 5, at 37 ("Clinical training and judgment are required to interpret test results and assess intellectual performance.").

[29] *See* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009) ("Hence, clinical judgment should not be used as a shield when one draws conclusions that are not supported by the assessment results, observations, and/or case records.").

[30] This excludes, of course, impressionistic and unscientific "observations."

Diagnoses lack validity when basic scientific principles are ignored.[31]

> Alternatively, an examiner might simply conclude that the defendant "does not seem mentally retarded," independent of IQ score, effort testing, and structured adaptive behavior assessment. Such idiosyncratic methods and intuitive observations have no normative comparisons, have not been scientifically tested, have no known reliability or validity, and reflect unsystematic and potentially confirmatory sampling bias. Whatever their anecdotal appeal, such methods lack scientific rigor and are not appropriate expressions of clinical judgment.

Macvaugh & Cunningham, *supra* note 11, at 155.

[31] *See* American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68 Am. Psychologist 7, 15 (2013) ("Forensic practitioners use assessment procedures in the manner and for the purposes that are appropriate in light of the research on or evidence of their usefulness and proper application."); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 57 Am. Psychologist 1060, 1064 (2002) ("Psychologists' work is based upon established scientific and professional knowledge of the discipline.") (Standard 2.04); *see also* Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* 15 (2d ed. 2014) ("Clinical judgment is *not* . . . a vehicle for stereotypes or prejudices . . . .").

II. States Are Not Free to Ignore Accepted Scientific Standards in Adjudicating Cases Involving Intellectual Disability.

The scientific and clinical understanding of intellectual disability is no less essential for the adaptive behavior prong than it is for the intellectual impairment prong. *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (The defendant must "have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime."). And the scientific consensus about the proper diagnostic standards regarding deficits is as clear and as firmly established as the consensus about measuring intellectual functioning.

As is the case in other fields, clinical science advances with new discoveries and, more frequently, with refined understanding of established principles. Our clinical understanding of intellectual disability is no exception. In implementing this Court's ruling in *Atkins*, lower courts must be free to consider refinements of our understanding of the phenomenon, and cannot be commanded to blind themselves to the advancements in the consensus of scientists and clinicians. Clinical understanding cannot, of course, be treated as if it were fixed in amber, and any requirement for courts to willfully blind their eyes to proven advances in scientific understanding is inconsistent with basic Constitutional principles.[32]

---

[32] *See generally Graham v. Florida*, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 n.5 (2012)

But the larger constitutional issue presented by this case is the choice by the Texas Court of Criminal Appeals to ignore scientific principles altogether, even those that have been clearly accepted and established for decades.[33] The court maintains that the Eighth Amendment protections of *Atkins* apply only to a sub-set of defendants with intellectual disability,[34] and therefore it need not use clinical standards.[35]

("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

[33] As this Court noted in *Hall*, "[T]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." 134 S. Ct. 1986, 2000 (2014). Since the Texas approach to the second prong is supported by virtually *no* clinical authority, it can hardly be seen as "informed by the medical community's diagnostic framework."

[34] Remarkably, the Court of Criminal Appeals offers, as part of its justification for the consideration for nonclinical factors, the suggestion that this Court's finding of a national consensus against executing individuals with intellectual disability might not be controlling. It speculates about whether "[there is] a national *or Texas consensus* that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria?" *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004) (emphasis added). It also suggests that this narrower protected group who satisfy the Texas consensus may be defined by their "level and degree of mental retardation." *Id.* While this Court invited the States to devise procedures for the adjudication of intellectual disability cases, *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), it has never suggested that any State is authorized to reduce the group of individuals entitled to Eighth Amendment protection because of a perceived consensus

As an additional part of its effort to limit the reach of *Atkins*, Texas instructs its courts to evaluate defendants using a list of characteristics that it deems incompatible with a diagnosis of intellectual disability. *See Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004). The list of so-called "factors" consists primarily of stereotypes and supposed

---

in that State. *See Hall*, 134 S. Ct. at 1999 ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become reality.").

35 In the opinion below, the Texas Court of Criminal Appeals rejected the clinical standard for the diagnosis of intellectual disability for *Atkins* purposes. It explained that, in its view, there are two different definitions of adaptive behavior, one "[f]or purposes of the Eighth Amendment," and the other from clinical organizations "for purposes of making a clinical diagnosis of intellectual disability." *Ex parte Moore*, 470 S.W.3d 481, 488 (Tex. Crim. App. 2015). The court elaborated on its differing standards theory stating that "[i]n the Eighth Amendment context," applicants must satisfy more than the first two prongs of the clinical definition, they must also prove *causation* between them by showing that "adaptive behavior deficits are related to significantly sub-average general intellectual functioning rather than some other cause." *Id.* (The "other" causes about which the court speculated in this case included childhood abuse-related trauma and learning disability.) *Id.* at 526. Finally, the court stated that it had chosen to disregard the testimony of the defendant's experts because they "appear to have applied a more demanding standard to the issue of adaptive behavior than we have contemplated for Eighth Amendment purposes." *Id.* at 525. Specifically it took issue with the fact that the experts had complied with accepted clinical standards by refusing to consider stereotypes, isolated strengths, and testimony about prison behavior in their assessment. *See id.*

strengths, such as planning ability, responding rationally, and dissembling.[36] This approach violates the established diagnostic principle that the second prong of the definition focuses solely on *deficits* rather than isolated strengths or abilities.

Distorting the definition with invented exclusionary factors is fundamentally inconsistent with the clinical understanding of intellectual disability, and has no support in the scientific and clinical literature in the field.[37] It has been rejected by scholars and practitioners who study and work

---

[36] The Court of Criminal Appeals maintains that the *Briseno* factors do not replace the clinical definition, but rather merely supplement or augment it. *See, e.g.*, *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) ("While we did not make consideration of any or all of these factors mandatory, they reflected our concern that the AAIDD's guidelines should not be considered in isolation, but rather in the context of the concerns expressed by the Supreme Court in *Atkins*."). The Texas court's expressed concern is that the clinical definition of the second prong is too "subjective," and that its invented factors are "more objective." *See Ex parte Cathey*, 451 S.W.3d 1, 11 n.22 (Tex. Crim. App. 2014). However, there appear to be no cases in which the court uses its factors to expand the group of individuals who satisfy the second prong, but abundant examples where they are used to restrict it to a sub-set of those who satisfy the clinical definition. It has instructed lower courts by reversing at least one decision that used the clinical definition, and ordered reconsideration in light of the factors. *Sosa*, 364 S.W.3d at 890.

[37] Notably, Texas uses the clinical definition of intellectual disability for all legal purposes other than those involving the death penalty. *See, e.g.*, Tex. Health & Safety Code Ann. § 593.005 (West 2010 & Supp. 2016).

with people with intellectual disability.[38] Each of the Texas court's factors is individually problematic because none is based upon clinical understanding of intellectual disability.[39] However, the more

---

[38] *See, e.g.*, Macvaugh & Cunningham, *supra* note 11, at 136 ("The seven criteria of the *Briseno* opinion operationalize an *Atkins* interpretation that only exempts a subcategory of persons with mental retardation from execution."); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill Rts. J. 467, 481 (2014) ("Using these seven factors as part of a diagnosis has the potential (if strictly interpreted) to exclude anyone functioning in the mild ID range from the protection of *Atkins*.").

Dr. Everington's concern about the exclusion from *Atkins* protection of individuals with "mild" ID (who constitute the vast majority of capital defendants with intellectual disability) seems fully borne out by the Court of Criminal Appeals' observation about whether the *Briseno* factors align with the clinical definition. *See, e.g.*, *Sosa*, 364 S.W.3d at 892.

[39] The almost exclusive focus of the Texas factors is on purported strengths or abilities of the individual, rather than deficits. In addition, the first factor, whether others viewed the individual as having mental retardation, *see Briseno*, 135 S.W.3d at 8, relies on whatever stereotypes that particular lay informant may have held about what "mental retardation" meant and looked like. But the Texas factor that is most obviously at odds with the clinical literature concerning the diagnosis of intellectual disability is the final one in the list: whether the facts of the crime were consistent with a diagnosis of mental retardation. In addition to their potentially prejudicial effect, *see generally* Fed. R. Evid. 403, the facts of the crime have no relevance to deficits, and this approach has been rejected by clinical experts. *See, e.g.*, Macvaugh & Cunningham, *supra* note 11, at 169 ("Evaluators are discouraged from utilizing criminal behavior to ascertain the presence or absence of deficits in adaptive functioning."); American Association on Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition,*

fundamental problem is that both the apparent goal, and the actual effect, of reducing the number of defendants entitled to the Constitution's protection are inconsistent with this Court's teachings.

The Texas re-formulation of the definition's second prong bears little resemblance to the professional definition's clear focus on deficits in adaptive behavior. This approach is inconsistent with accepted diagnostic standards and practices.

As this Court has observed, "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). But every capital defendant who may have intellectual disability should have the relevant evidence evaluated according to scientifically accepted standards.

Texas' invention and adoption of a list of unscientific criteria for adaptive functioning has the

---

Classification, and Systems of Supports 18 (2012) ("Distinguish between adaptive behavior and problem behavior(s). They are independent constructs and not opposite poles of a continuum. Information regarding problem behavior does not inform the clinician regarding the person's adaptive behavior."); *id.* at 20 ("Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior. . . . The diagnosis of ID is not based on the person's 'street smarts', behavior in jail or prison, or 'criminal adaptive functioning.'").

effect (and, apparently, the purpose) of limiting the protection of *Atkins* to a sub-set of those defendants who satisfy the clinical definition of intellectual disability.[40] This is incompatible with the Eighth Amendment's prohibition of Cruel and Unusual Punishments.

Amici believe that the basic framework of the clinical definition is the constitutionally required standard for determining whether a defendant has intellectual disability.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
ANN M. DELPHA
CAROL M. SUZUKI
STEVEN K. HOMER
DAVID J. STOUT
APRIL LAND

August 4, 2016 *Counsel for Amici Curiae*

---

[40] *See Roper v. Simmons*, 543 U.S. 551, 563–64 (2005) (In *Atkins*, "the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders.").

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG - 4 2016
OFFICE OF THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
TEXAS CRIMINAL COURT OF APPEALS

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:
DANIELLE SPINELLI
CATHERINE M.A. CARROLL
ARI J. SAVITZKY
ROBBIE MANHAS

PAULETTE BROWN
Counsel of Record
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

QUESTION PRESENTED

Whether Texas's prohibition on the use of current clinical standards, and its use of standards that contravene clinical practice, to identify capital defendants with intellectual disabilities violates the Eighth Amendment principles articulated in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), and *Hall* v. *Florida*, 134 S. Ct. 1986 (2014).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. TEXAS'S STANDARDS FOR INTELLECTUAL DISABILITY CONTRADICT ESTABLISHED CLINICAL STANDARDS IN VIOLATION OF THE EIGHTH AMENDMENT 7

A. Texas's *Briseno* Standard Contravenes Clinical Standards For Diagnosing Intellectual Disability 7

B. Texas's Non-Clinical Standard For Determining Intellectual Disability Is Unconstitutional Under *Atkins* And *Hall* 16

II. TEXAS IS AN OUTLIER IN REFUSING TO PROVIDE THE PROTECTION OF *ATKINS* TO ALL PERSONS WITH INTELLECTUAL DISABILITIES 18

A. Other States Have Rejected *Briseno* And Acknowledged That *Atkins* And *Hall* Require Using Clinical Standards For Intellectual Disability 19

B. Texas's Approach Permits The Execution Of Individuals Who Would Not Be Eligible For The Death Penalty Under Clinical Standards 22

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page(s)

Atkins v. *Virginia*, 536 U.S. 304 (2002) ..... *passim*

Blonner v. *State*, 127 P.3d 1135 (Okla. Crim. App. 2006) 20

Bowling v. *Commonwealth*, 163 S.W.3d 361 (Ky. 2005) 19

Brumfield v. *Cain*, 135 S. Ct. 2269 (2015) 13

Chase v. *State*, 171 So. 3d 463 (Miss. 2015) 20

Commonwealth v. *Bracey*, 117 A.3d 270 (Pa. 2015) 21

Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex parte Chester, 2007 WL 602607 (Tex. Crim. App. Feb 28, 2007) 23

Ex parte Sosa, 364 S.W.3d 889 (Tex. Crim. App. 2012) 14, 17

Ex parte Van Alstyne, 239 S.W.3d 815 (Tex. Crim. App. 2007) 11

Gallo v. *State*, 239 S.W.3d 757 (Tex. Crim. App. 2007) 14

Gregg v. *Georgia*, 428 U.S. 153 (1976) 3

Hall v. *Florida*, 134 S. Ct. 1986 (2014) ..... *passim*

Holladay v. *Allen*, 555 F.3d 1346 (11th Cir. 2009) 20, 22

Holladay v. *Campbell*, 463 F. Supp. 2d 1324 (N.D. Ala. 2006) 23, 25

TABLE OF AUTHORITIES—Continued

Page(s)

Hughes v. *Epps*, 694 F. Supp. 2d 533 (N.D. Miss. 2010) 23, 27

Lambert v. *State*, 126 P.3d 646 (Okla. Crim. App. 2005) 22

Lizcano v. *State*, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) 15, 24, 25

Nicholson v. *Branker*, 739 F. Supp. 2d 839 (E.D.N.C. 2010) 27

Ortiz v. *United States*, 664 F.3d 1151 (8th Cir. 2011) 20

Sasser v. *Hobbs*, 735 F.3d 833 (8th Cir. 2013) 22

State v. *White*, 885 N.E.2d 905 (Ohio 2008) 20, 22

Thomas v. *Allen*, 607 F.3d 749 (11th Cir. 2010) 22

United States v. *Candelario-Santana*, 916 F. Supp. 2d 191 (D.P.R. 2013) 21

United States v. *Davis*, 611 F. Supp. 2d 472 (D. Md. 2009) 20

United States v. *Montgomery*, 2014 WL 1516147 (W.D. Tenn. Jan. 28, 2014) 21

United States v. *Webster*, 421 F.3d 308 (5th Cir. 2005) 20

United States v. *Wilson*, 2016 WL 1060245 (E.D.N.Y. Mar. 15, 2016) 20

Van Tran v. *Colson*, 764 F.3d 594 (6th Cir. 2014) 20, 21, 22

TABLE OF AUTHORITIES—Continued

Page(s)

Van Tran v. *State*, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006) 21

Wiley v. *Epps*, 668 F. Supp. 2d 848 (N.D. Miss. 2009) 25

Wiley v. *Epps*, 625 F.3d 199 (5th Cir. 2010) 25

Wilson v. *Quarterman*, 2009 WL 900807 (E.D. Tex. Mar. 31, 2009) 26, 27

Wilson v. *Thaler*, 450 F. App'x 369 (5th Cir. 2011) 27

Ybarra v. *State*, 247 P.3d 269 (Nev. 2011) 19

STATUTES

18 U.S.C. § 3596(c) 20

Del. Code Ann. tit. 11, § 4209(d)(3)(d)(1) 19

Idaho Code § 19-2515A(1)(a) 19

Ky. Rev. Stat. Ann. § 532.130(2) 19

Mo. Rev. Stat. § 565.030(6) 19

N.C. Gen. Stat. § 15A-2005(a)(1)(b) 19

Nev. Rev. Stat. § 174.098(7) 19

Okla. Stat. tit. 21, § 701.10b(A)(2) 19

Va. Code Ann. § 19.2-264.3:1.1(B)(2) 20

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) 8, 9, 10, 13, 14

American Association on Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* (2012) 14

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 7, 9, 10

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) 9

American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* (Sept. 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

American Bar Association, *State Death Penalty Assessments*, *available at* http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited Aug. 4, 2016) 4

American Bar Association House of Delegates Recommendation 110 (adopted 1989), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1989_my_110.authcheckdam.pdf 2

American Bar Association House of Delegates Recommendation 122A (adopted 2006), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_122a.authcheckdam.pdf 3

American Bar Association Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (June 2001), *available at* www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2001.authcheckdam.pdf 2, 3

TABLE OF AUTHORITIES—Continued

Page(s)

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) 15

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) 8, 9, 12, 15

Blume, John H., et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of A Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393 (2014) 15

Ellis, James W., *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11 (2003) 3, 11

Fowler, Anne E., *Language Abilities in Children with Down Syndrome, in Children with Down Syndrome: A Developmental Perspective* 302 (Dante Cicchetti & Marjorie Beeghly eds., 1990) 12

Kamhi, Alan G., and Judith R. Johnston, *Towards an Understanding of Retarded Children's Linguistic Deficiencies*, 25 J. Speech & Hr'g Res. 435 (1982) 12

Liptak, Adam, *Date Missed, Court Rebuffs Low-I.Q. Man Facing Death*, N.Y. Times, Dec. 17, 2005, at A14 26

TABLE OF AUTHORITIES—Continued

Page(s)

Richardson, Stephen A., et al., *Patterns of Leisure Activities of Young Adults with Mild Mental Retardation*, 97 Am. J. Mental Retardation 431 (1993) 12

Sodian, Beate, & Uta Frith, *Deception and Sabotage in Autistic, Retarded and Normal Children*, 33 J. Child. Psychol. & Psychiatry 591 (1992) 13

Tobolowsky, Peggy M., *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1 (2011) 19

Tobolowsky, Peggy M., Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. Legis. 77 (2003) 19

IN THE

Supreme Court of the United States

No. 15-797

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA's membership also in-

[1] No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. The parties have granted blanket consent to the filing of amicus briefs.

cludes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has advocated for the improvement of the justice system. Although the ABA takes no position on the death penalty itself, it has a well-established concern that the death penalty be enforced in a fair and unbiased fashion, with appropriate procedural protections. In 1986, the ABA founded the ABA Death Penalty Representation Project to provide training and technical assistance to judges and lawyers in death-penalty jurisdictions. Since 1989, the ABA has had a policy stating "that no person with mental retardation, as now defined by the American Association on Mental Retardation [AAMR], should be sentenced to death or executed." ABA House of Delegates Recommendation 110 (adopted 1989).[3] In 2001, the ABA Section of Individual Rights and Responsibilities issued a set of recommended protocols to improve the administration of the death penalty. ABA Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (June 2001). The protocols included recommendations that the death penalty not be imposed upon "individuals who have mental retardation, as that term is defined by the [AAMR]," and that "[w]hether the definition is sat-

---

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

[3] Like this Court, the ABA consistently used the terms "mental retardation" and "mentally retarded" prior to the *Hall* decision. *See Hall* v. *Florida*, 134 S. Ct. 1986, 1990 (2014) (noting "change in terminology"); *see also infra* n.4.

isfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure." *Id.* at 63.

Following this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the ABA developed guidelines and best practices for implementing *Atkins*. In 2003, the ABA published *Mental Retardation and the Death Penalty*, which included model legislation for States implementing *Atkins*. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11 (2003). The ABA also established the Task Force on Mental Disability and the Death Penalty, composed of lawyers, mental-health practitioners, and academics, to examine the imposition of the death penalty on persons with intellectual disability and other mental or psychiatric conditions and limitations. In 2006, the ABA adopted as policy the Task Force's conclusion that the death penalty should not be imposed on persons with "significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation." ABA House of Delegates Recommendation 122A, at 1 (adopted 2006). Finally, the ABA filed an amicus brief in support of the petitioner in *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), explaining that Florida's scheme for determining intellectual disability based on a rigid IQ test score cut-off violated clinical standards and the rule of *Atkins*.

Of particular significance to this brief, between 2003 and 2013, the ABA's Death Penalty Due Process Review Project conducted comprehensive assessments of the operation of the death penalty in twelve States, including Texas, that together have carried out almost 65% of all executions since *Gregg* v. *Georgia*, 428 U.S.

153 (1976). ABA, *State Death Penalty Assessments, available at* http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited Aug. 4, 2016). The assessments were conducted by teams including current or former judges, prosecutors, and defense attorneys; state bar representatives; state legislators; and law professors, who evaluated each State's administration of the death penalty against uniform benchmarks of fairness and accuracy set out in the ABA's 2001 protocols. Each assessment includes an evaluation of the State's procedures for determining whether a capital defendant has an intellectual disability and is thus exempt from the death penalty.

Notably, the ABA's Texas assessment found that Texas does not determine intellectual disability according to clinical standards. Rather, Texas has adopted standards that are "not supported by any medical authority and instead rely on popular misconceptions regarding how persons with mental retardation behave." ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* x (Sept. 2013) (*ABA Texas Assessment*). The assessment warns that this approach "creates an unacceptable risk that persons with mental retardation will receive the death penalty or be executed." *Id.*

In light of the intensive work the ABA has done evaluating death-penalty jurisdictions' standards and procedures for determining intellectual disability, it submits this brief to assist the Court in considering whether Texas's standards for determining intellectual disability comport with the Constitution.

SUMMARY OF ARGUMENT

In this case, the Texas Court of Criminal Appeals (CCA) prohibited Texas courts from considering current clinical standards for determining intellectual disability, instead requiring them to apply a standard articulated by the CCA in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). *Briseno* purported to apply the AAMR's 1992 standards for determining intellectual disability, but in fact departed from those standards in numerous ways. Most egregiously, *Briseno* replaced the clinical standards for determining whether a defendant has deficits in adaptive functioning—one of the three critical components of an intellectual-disability diagnosis—with a fundamentally different and far more restrictive test of the CCA's own invention that lacks any clinical basis.

The so-called "*Briseno* factors"—which include such questions as whether the defendant's family and friends think he has an intellectual disability, whether the defendant can respond coherently to a question, whether he can lie, and whether his crime required planning—all depart from clinical standards in many ways. For example, they rely on and reflect lay stereotypes of intellectual disability that are not used in clinical assessments and that often bear no relation to the actual abilities and behavior of individuals with intellectual disability. They invite courts to overlook a defendant's deficits in adaptive functioning based on strengths in other areas, despite the scientific consensus that adaptive limitations often coexist with strengths in persons with intellectual disability. And they emphasize the circumstances of the defendant's crime even when they are atypical of the defendant's functioning in everyday life.

No scientific authority supports the CCA's approach, which allows the execution of individuals who indisputably meet clinical standards for a diagnosis of intellectual disability. That is not happenstance: The CCA adopted the *Briseno* test specifically for the purpose of restricting the protections of *Atkins* v. *Virginia*, 536 U.S. 304 (2002), to a small subgroup of persons with intellectual disabilities. In the CCA's view, its task was not to ensure that no persons with intellectual disability are executed, but to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseno*, 135 S.W.3d at 6.

As *Atkins* and *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), make clear, however, States do not have license to ignore the medical community's agreed-upon standards for diagnosing intellectual disability. "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 134 S. Ct. at 1999. Indeed, "[t]he clinical definitions of intellectual disability ... were a fundamental premise of *Atkins*." *Id.* Accordingly, States may not "disregard[] established medical practice" and establish a standard for defining intellectual disability that contradicts that practice. *Id.* at 1995. Texas's *Briseno* standard overrides established clinical practice in the exact way *Hall* found impermissible.

Unsurprisingly, Texas's anti-clinical approach to adaptive functioning is an outlier. As legislation, judicial decisions, and the ABA's assessments of numerous capital jurisdictions make clear, most States seek to employ standards that bar the death penalty for all

persons who warrant a clinical diagnosis of intellectual disability. Because Texas repudiates those standards, its approach has excluded multiple defendants with compelling claims of intellectual disability from the protection of *Atkins*. That approach contravenes the Eighth Amendment and should be rejected.

ARGUMENT

I. TEXAS'S STANDARDS FOR INTELLECTUAL DISABILITY CONTRADICT ESTABLISHED CLINICAL STANDARDS IN VIOLATION OF THE EIGHTH AMENDMENT

A. Texas's *Briseno* Standard Contravenes Clinical Standards For Diagnosing Intellectual Disability

In *Atkins*, this Court cited clinical, scientifically based standards as the proper measure of whether a criminal defendant is intellectually disabled and thus ineligible for execution under the Eighth Amendment. Specifically, this Court endorsed the AAMR's three-part definition of intellectual disability: "'[1] significantly subaverage intellectual functioning, [2] existing concurrently with related limitations in two or more of the following applicable adaptive skill areas ... [3] manifest[ing] before age 18.'" *Atkins* v. *Virginia*, 536 U.S. 304, 308 n.3 (2002) (quoting AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) (*1992 AAMR Manual*)).[4] In *Hall*

[4] Since *Atkins*, the AAMR has changed its name to the American Association on Intellectual and Developmental Disabilities, or AAIDD, to be consistent with the change in terminology from "mental retardation" to "intellectual disability." The basic definition of intellectual disability, however, has remained the same. The current AAIDD manual explains that "[i]ntellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social,

v. *Florida*, this Court reaffirmed that "clinical definitions of intellectual disability ... were a fundamental premise of *Atkins*," and rejected as inconsistent with the Eighth Amendment an approach to assessing intellectual disability that "disregard[ed] established medical practice," thereby creating an unacceptable "risk[] [of] executing a person who suffers from intellectual disability." 134 S. Ct. 1986, 1995, 1999, 2001 (2014).

Notwithstanding *Atkins* and *Hall*, the CCA in this case expressly rejected established clinical standards for diagnosing intellectual disability. Indeed, the CCA overturned the trial court's finding that Moore has an intellectual disability on the ground that the court had erred by relying on current clinical standards for determining intellectual disability. Pet. App. 5a-12a. Stating that "the mental-health fields and opinions of mental-health experts ... do not determine whether an individual is exempt from execution under *Atkins*," the CCA held that courts were *required* to abide by the standards for intellectual disability that it had established in *Ex parte Briseno* and were *prohibited* from relying on current clinical standards. Pet. App.7a.[5]

Briseno purported to adopt the standard for intellectual disability set out in the AAMR's 1992 manual

---

and practical adaptive skills" and "originates before age 18." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) (*AAIDD Manual*); *see also* APA, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) (*DSM-5*) ("[t]he essential features of intellectual disability ... are deficits in general mental abilities ... and impairment in everyday adaptive functioning," with onset "during the developmental period").

[5] The Texas legislature has never enacted a statute implementing *Atkins*, so there is no statutory definition of intellectual disability for purposes of capital punishment. Pet. App. 7a.

and quoted in *Atkins*, requiring "significantly subaverage general intellectual functioning ... accompanied by related limitations in adaptive functioning." 135 S.W.3d 1, 7 (Tex. Crim. App. 2004) (internal quotation marks omitted). But while it paid lip service to *Atkins*, *Briseno* immediately proceeded to rewrite the standard for assessing limitations in adaptive behavior, rejecting clinical standards in the process. As *Atkins* noted, the AAMR's 1992 manual explained that limitations in adaptive behavior mean deficits in two or more of the following areas: "'communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.'" 536 U.S. at 308 n.3 (quoting *1992 AAMR Manual*); *see also id.* (reciting the APA's materially identical criteria). The current AAIDD manual frames the inquiry as whether a person has significant limitations in one of three broader domains—conceptual, social, or practical adaptive behavior. *AAIDD Manual* 43; *see also DSM-5* at 37 ("Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical.").[6] But the basic idea remains the same: Each of the former ten skill areas is "conceptually linked" to one or more of the broader domains. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 81 (10th ed. 2002). Critically, a person's particular *strengths* are irrelevant to the inquiry: An individual with intellectual disability may well possess

---

[6] "Conceptual skills" include "language; reading and writing; and money, time, and number concepts"; "[s]ocial skills" include "interpersonal skills, social responsibility, self-esteem, gullibility, ... and social problem solving"; and "[p]ractical skills" include "activities of daily living ..., occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." *AAIDD Manual* 44 (italics omitted).

some adaptive skills, but the condition is—and has long been—defined by *limitations* in adaptive behavior. *AAIDD Manual* 47; *see also 1992 AAMR Manual* 1 ("Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities[.]").

Briseno expressly rejected those established clinical criteria for assessing adaptive behavior, opining—without support—that they were "exceedingly subjective." 135 S.W.3d at 8. Instead, *Briseno* instructed courts to employ seven non-clinical factors for assessing adaptive behavior:

> [1] Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
>
> [2] Has the person formulated plans and carried them through or is his conduct impulsive?
>
> [3] Does his conduct show leadership or does it show that he is led around by others?
>
> [4] Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> [5] Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
>
> [6] Can the person hide facts or lie effectively in his own or others' interests?
>
> [7] Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require fore-

> thought, planning, and complex execution of purpose?

Id. at 8-9.

These factors are scientifically bankrupt. Tellingly, they "are absent from other areas of Texas law" concerning intellectual-disability determinations. *ABA Texas Assessment* 396. And *Briseno* offered no authority supporting their use in any context. To the contrary, the court acknowledged that the factors diverge from established medical practice, opining that it is "understandable that those in the mental health profession should define mental retardation broadly," but that Texas citizens might not agree that all persons who meet clinically based "definition[s] of mental retardation" should be exempt from the death penalty. 135 S.W.3d at 6; *see also Ex parte Van Alstyne*, 239 S.W.3d 815, 820 & n.29 (Tex. Crim. App. 2007) (per curiam) (*Briseno* factors are "non-diagnostic").

As the ABA has documented, the *Briseno* factors contravene clinical standards for diagnosing intellectual disability in several ways.

1. *Reliance on lay stereotypes.* The *Briseno* factors reflect lay stereotypes rather than objective medical diagnosis. The first factor alone—whether family, friends, and other laypeople believed the defendant had an intellectual disability as a child—allows the opinions of those without training to displace those of medical professionals. It should go without saying that, "[w]hile laypersons may be able to provide descriptions of the defendant's behavior that are relevant to a mental retardation diagnosis, they are not qualified to make this diagnosis themselves." *ABA Texas Assessment* 396; *see also* Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental

& Physical Disability L. Rep. 11, 13 n.29 (2003) ("[T]hat an individual possesses one or more [skills] that might be thought by some laypersons [to be] inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying.").

The other factors similarly reflect lay conceptions of the intellectually disabled that have no scientific basis. For example, the fourth factor, which asks whether the defendant can respond rationally to external stimuli, reflects the misconception that a person with intellectual disability is categorically incapable of reacting sensibly to his or her environment. Yet according to the DSM-5, some intellectually disabled individuals "may function age-appropriately in personal care," possess "[r]ecreational skills resembl[ing] age-mates," and pursue "competitive employment ... in jobs that do not emphasize conceptual skills." *DSM-5* at 34; *see also* Richardson et al., *Patterns of Leisure Activities of Young Adults with Mild Mental Retardation*, 97 Am. J. Mental Retardation 431, 433, 440 (1993) (study of young adults with intellectual disability, some of whom had jobs, were married, and had children).

The fifth factor, which asks whether a defendant can respond coherently to questioning, assumes that people with intellectual disability must lack normal language skills, another lay misconception. Research predating *Atkins* has shown that, for the most part, persons with intellectual disability have qualitatively normal syntax, vocabulary, and grammar. Fowler, *Language Abilities in Children with Down Syndrome, in Children with Down Syndrome: A Developmental Perspective* 302 (Cicchetti & Beeghly eds., 1990) ("the language structures that are acquired by children with Down Syndrome ... [are] normal and unremarkable in the order of their appearance"); Kamhi & Johnston,

Towards an Understanding of Retarded Children's Linguistic Deficiencies, 25 J. Speech & Hr'g Res. 435, 444 (1982) (language abilities of children with intellectual disability are comparable to normal children's).

The sixth factor similarly treats the ability to lie as inconsistent with intellectual disability, but the capacity for deceptive behavior in some persons with intellectual disability is well-documented. *E.g.*, Sodian & Frith, *Deception and Sabotage in Autistic, Retarded and Normal Children*, 33 J. Child. Psychol. & Psychiatry 591, 601 [year] (task in which "children had to tell a simple lie to prevent an opponent from winning a reward ... was easily passed by almost all normal 4-year olds and by all retarded children with a mental age of about 5 years"). The *Briseno* factors thus allow the determination of intellectual disability to turn on lay conceptions of a host of behaviors (rationality, intelligibility, lying) that have minimal or no relevance to a clinical diagnosis of intellectual disability.

2. *Improper consideration of adaptive strengths.* The *Briseno* factors improperly emphasize adaptive strengths. They assume that a person does not have intellectual disability if he or she exhibits certain skills or capacities, regardless of how significant his or her deficits may be in other areas of functioning. Accepted clinical standards, on the other hand, focus on deficits: "Individuals with an [intellectual disability] typically demonstrate both strengths and limitations in adaptive behavior. Thus, in the process of diagnosing [intellectual disability], significant limitations in conceptual, social, or practical adaptive skills are not outweighed by the potential strengths in some adaptive skills." *AAIDD Manual* 47; *see also Brumfield* v. *Cain*, 135 S. Ct. 2269, 2281 (2015) (citing clinical guidance explaining

that "intellectually disabled persons may have 'strengths in ... some adaptive skill areas'").

3. *Failure to focus on typical performance.* The *Briseno* factors encourage the factfinder to focus on the crime itself, rather than the individual's typical performance in ordinary settings, which is the focus of the clinical diagnostic inquiry. *Gallo* v. *State*, 239 S.W.3d 757, 777 (Tex. Crim. App. 2007) ("[M]any of the *Briseno* factors pertain to the facts of the offense and the defendant's behavior before and after the commission of the offense."). The seventh factor, for instance, deals only with the nature of the offense, and it can override a firmly established clinical diagnosis of intellectual disability. *Ex parte Sosa*, 364 S.W.3d 889, 893-896 (Tex. Crim. App. 2012) (reversing and remanding finding that defendant had intellectual disability because, although trial court made findings on the first six factors, it did not make findings regarding the seventh factor).

This emphasis on the offense itself contravenes the longstanding clinical recognition that adaptive functioning concerns "the collection of conceptual, social, and practical skills that have been learned and are performed by people *in their everyday lives*." *AAIDD Manual* 43 (emphasis added). Accordingly, "[t]he assessment of adaptive behavior focuses on the individual's typical performance." *Id.* at 47. Indeed, the AAIDD specifically prohibits using "past criminal behavior" as a measure of adaptive behavior. AAIDD, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* 20 (2012); *see also id.* ("The diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning.'").

4. *Failure to recognize that other mental disorders do not preclude intellectual disability.* *Briseno* assumes that intellectual disability is incompatible with other mental disorders, such as personality disorder; indeed, the *Briseno* factors purportedly permit fact-finders to determine whether a defendant has "mental retardation *or* ... a personality disorder." 135 S.W.3d. at 8 (emphasis added). But intellectual disability and personality disorder are not mutually exclusive. Even before *Atkins*, the medical community understood that "[i]ndividuals with [m]ental [r]etardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than the general population." APA, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 1994) (*DSM-IV*); *see also DSM-5* at 40 (similar). For that reason, clinicians follow the rule that a diagnosis of intellectual disability "should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder." *DSM-IV* at 45.

In short, *Briseno* is not remotely consistent with the accepted clinical approach to diagnosing intellectual disability. As the ABA found in its assessment of Texas's administration of the death penalty, *Briseno*'s "interpretation of the adaptive behavior component diverges significantly from the AAIDD standard," and "in many cases the *Briseno* factors have been used to overrule clinical adaptive functioning assessments that indicate the defendant has mental retardation." *ABA Texas Assessment* 392, 397.

The *Briseno* factors thus exclude from the protection of *Atkins* many defendants who meet the clinical criteria for an intellectual disability. *See* Blume et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After*

the Supreme Court's Creation of A Categorical Bar, 23 Wm. & Mary Bill Rts. J. 393, 397, 413 (2014) (pre-*Hall* analysis finding that average national success rate for *Atkins* claims was 55%, whereas rate in Texas was roughly 18%); *see also Lizcano* v. *State*, 2010 WL 1817772, at *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting) ("[*Briseno* factors] grant ... latitude to fact-finders in Texas to adjust the clinical criteria for adaptive deficits to conform to their own normative judgments with respect to which mentally retarded offenders are deserving of the death penalty and which are not."). Indeed, as discussed further below, *Briseno* was designed to do just that, ensuring that only defendants with intellectual disabilities that conform to lay stereotypes—rather than *all* defendants with intellectual disabilities—are exempt from execution.

B. Texas's Non-Clinical Standard For Determining Intellectual Disability Is Unconstitutional Under *Atkins* And *Hall*

Texas's anti-clinical approach rests on a faulty understanding of *Atkins*. That case established a categorical rule: The death penalty cannot be imposed on any person with an intellectual disability, as determined by clinical standards. *Atkins*, 536 U.S. at 318 (noting several reasons why "the mentally retarded should be categorically excluded from execution"); *see also Hall*, 134 S. Ct. at 1992 ("The Eighth Amendment prohibits certain punishments as a categorical matter. ... [P]ersons with intellectual disability may not be executed."); *see supra* pp. 7-8.

Yet the Texas courts have refused to recognize this basic holding. To the contrary, *Briseno* opined that *Atkins* had *not* established "a 'mental retardation' bright-line exemption from [Texas's] maximum statutory pun-

ishment," and that the court's task was accordingly to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." 135 S.W.3d at 6. The court posited that "[m]ost Texas citizens might agree that Steinbeck's Lennie"—a fictional character from the 1937 novel *Of Mice and Men*—should be exempt from the death penalty. *Id.* But the court suggested that other persons with intellectual disabilities should not be. *Id.* at 5-6. And Texas courts have so interpreted *Briseno*. *See, e.g.*, *Sosa*, 364 S.W.3d at 892 (opining that "whether a defendant is mentally retarded for particular clinical purposes" is not dispositive). That approach cannot be squared with *Atkins* and *Hall*, which brook no distinctions among persons with intellectual disabilities for Eighth Amendment purposes.

Given this misunderstanding of *Atkins*, Texas courts have deemed it unnecessary to adhere to clinical standards. But "[c]linical definitions of intellectual disability ... were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999; *see also id.* at 2000 ("The legal determination of intellectual disability ... is informed by the medical community's diagnostic framework."). States have no license to ignore clinical standards. Although *Atkins* "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,'" 536 U.S. at 317, States cannot, in developing these procedures, rely on standards that permit the execution of persons who would satisfy the clinical standards *Atkins* explicitly endorsed.

Accordingly, in *Hall*, this Court held that Florida's standard for evaluating the first prong of the diagnostic framework—"'significantly subaverage general intellectual functioning,'" 134 S. Ct. at 1994—contravened

the Eighth Amendment because it "disregard[ed] established medical practice" concerning the use of the standard error of measurement to evaluate IQ test scores. *Id.* at 1995; *see also id.* at 2001 ("Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test."). As the Court explained, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999. Texas's approach produces precisely that result.

II. TEXAS IS AN OUTLIER IN REFUSING TO PROVIDE THE PROTECTION OF *ATKINS* TO ALL PERSONS WITH INTELLECTUAL DISABILITIES

Texas is an outlier among the States in using an expressly anti-clinical standard—one that deliberately excludes most people with intellectual disabilities—to determine whether a person is ineligible for the death penalty under *Atkins*. That isolation is significant: Where "the vast majority of States" have rejected the use of a particular procedure or standard in imposing the death penalty, that is "strong evidence of consensus that our society does not regard [it] as proper or humane." *Hall*, 134 S. Ct. at 1998.

Moreover, as the ABA has documented, Texas's aberrant approach creates "a significant risk that persons with mental retardation remain on Texas's death row, and perhaps have been executed." *ABA Texas Assessment* 397. Texas's rejection of clinical standards has led Texas courts to impose the death penalty on defendants with intellectual disabilities whom other jurisdictions almost certainly would have recognized as exempt from the death penalty under *Atkins*. That

discrepancy is unacceptable. *See Hall*, 134 S. Ct. at 2001 (Florida's strict IQ cutoff constitutionally invalid in light of "risk[] [of] executing a person who suffers from intellectual disability").

A. Other States Have Rejected *Briseno* And Acknowledged That *Atkins* And *Hall* Require Using Clinical Standards For Intellectual Disability

No other State uses anything like the *Briseno* factors to define adaptive functioning. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 139-140, 142 (2011). To the contrary, through legislation and judicial rulings, numerous States have endorsed the use of clinical standards for determining intellectual disability.

As this Court observed in *Atkins*, 536 U.S. at 317 n.22, many death-penalty jurisdictions have enacted legislation requiring the application of standards that "generally conform to the clinical definitions" in assessing whether a capital defendant is ineligible for the death penalty due to intellectual disability. *See, e.g.*, Del. Code Ann. tit. 11, § 4209(d)(3)(d)(1); Idaho Code § 19-2515A(1)(a); Mo. Rev. Stat. § 565.030(6); N.C. Gen. Stat. § 15A-2005(a)(1)(b); Okla. Stat. tit. 21, § 701.10b(A)(2); *Ybarra* v. *State*, 247 P.3d 269, 273-275 & n.6 (Nev. 2011) (discussing Nev. Rev. Stat. § 174.098(7)); *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 369-370 & n.8 (Ky. 2005) (discussing Ky. Rev. Stat. Ann. § 532.130(2)).[7] Some go even further: Virginia

[7] Many of these statutes, including Delaware's and Idaho's, were revised immediately after *Atkins* to incorporate the AAMR's standard for evaluating adaptive functioning. *See, e.g.*, Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Of-*

requires not only a clinical definition, but also—where feasible—the use of a standardized clinical assessment to evaluate adaptive functioning. Va. Code Ann. § 19.2-264.3:1.1(B)(2).

Numerous other States have adopted or reinforced clinical standards by judicial decision. *See, e.g., Chase* v. *State*, 171 So. 3d 463, 470, 481-486 (Miss. 2015); *State* v. *White*, 885 N.E.2d 905, 907-908 (Ohio 2008); *Blonner* v. *State*, 127 P.3d 1135, 1140 (Okla. Crim. App. 2006); *see also, e.g., Holladay* v. *Allen*, 555 F.3d 1346, 1353 (11th Cir. 2009) (applying Alabama case law).

Federal courts have embraced clinical standards in interpreting federal law as well. Numerous federal courts since *Atkins* have held that the clinical definition of intellectual disability (and, specifically, of adaptive functioning) controls the analysis under 18 U.S.C. § 3596(c), the federal prohibition on execution of the intellectually disabled. *E.g., United States* v. *Webster*, 421 F.3d 308, 313 & n.14 (5th Cir. 2005); *United States* v. *Wilson*, 2016 WL 1060245, at *3-7, *15-19 (E.D.N.Y. Mar. 15, 2016); *United States* v. *Davis*, 611 F. Supp. 2d 472, 475-477 (D. Md. 2009); *see also, e.g., Ortiz* v. *United States*, 664 F.3d 1151, 1157-1158 (8th Cir. 2011) (noting use of clinical standards).

Courts outside of Texas have not only embraced current clinical standards; they have also repeatedly rejected Texas's outlier approach to evaluating adaptive behavior.

Some have done so explicitly. In *Van Tran* v. *Colson*, 764 F.3d 594, 608-612 (6th Cir. 2014), the Sixth Circuit held that the Tennessee Court of Criminal Appeals

---

fenders and Excluding Them from Execution, 30 J. Legis. 77, 92-93 & n.95 (2003).

had unreasonably found that a habeas petitioner did not have intellectual disability when that court—relying on Texas's *Briseno* factors, *see Van Tran* v. *State*, 2006 WL 3327828, at *23-25 (Tenn. Crim. App. Nov. 9, 2006)—rejected clinical evidence and instead emphasized the petitioner's adaptive strengths and the facts of the crime. The Sixth Circuit explained that this Court's precedent "requires the courts and legislatures to follow clinical practices in defining intellectual disability." 764 F3.d at 612; *see also United States* v. *Candelario-Santana*, 916 F. Supp. 2d 191, 212 (D.P.R. 2013) (in federal case, rejecting request to apply *Briseno* and explaining that, although some *Briseno* factors were "logical considerations" to the extent they were "consistent with the clinical definitions cited in *Atkins*," others "track the *Atkins* criteria less closely"); *United States* v. *Montgomery*, 2014 WL 1516147, at *48 (W.D. Tenn. Jan. 28, 2014) ("The Court finds the approach of other federal courts that have adhered mainly to the language found in the clinical literature, as opposed to the *Briseno* factors, more appropriate.").[8]

Where state and federal appellate courts do not expressly disclaim *Briseno*, they have criticized or reversed intellectual-disability decisions that have relied on lay stereotypes or focused on adaptive strengths rather than deficits. These courts have stressed the importance of adhering to clinical guidance to ensure accuracy in diagnosing intellectual disability. For example, contrary to Texas's approach, courts have recognized that adaptive deficits often coexist with strengths

---

[8] Even in Pennsylvania, the one jurisdiction that had cited *Briseno* positively, the state supreme court recently declined to apply the *Briseno* factors in a capital appeal. *Commonwealth* v. *Bracey*, 117 A.3d 270, 287 (Pa. 2015).

and that a defendant's possession of adaptive skills in some areas is "in no way inconsistent with" a diagnosis of intellectual disability. *White*, 885 N.E.2d at 914; *see also, e.g.*, *Van Tran*, 764 F.3d at 608-609; *Sasser* v. *Hobbs*, 735 F.3d 833, 845 (8th Cir. 2013); *Holladay*, 555 F.3d at 1363; *Lambert* v. *State*, 126 P.3d 646, 651 (Okla. Crim. App. 2005). Courts outside of Texas have also rejected reliance on the lay stereotypes that Texas encourages factfinders to consider. *See, e.g.*, *Thomas* v. *Allen*, 607 F.3d 749, 759 (11th Cir. 2010); *Van Tran*, 764 F.3d at 612; *White*, 885 N.E.2d at 915.

Texas thus stands apart: No other jurisdiction has devised an avowedly anti-clinical standard that erects a barrier to finding intellectual disability even when a medical professional applying clinical standards would reach that diagnosis.

B. Texas's Approach Permits The Execution Of Individuals Who Would Not Be Eligible For The Death Penalty Under Clinical Standards

Texas's aberrant approach is starkly illustrated by the Texas defendants who have been sentenced to die based on the *Briseno* factors despite strong evidence of intellectual disability under a clinical analysis.

To take just a few examples, Elroy Chester, Marvin Lee Wilson, and Juan Lizcano—whose cases were documented by the ABA's Texas death penalty assessment report—each demonstrated strong clinical evidence of intellectual disability, yet each was denied relief. And, if Texas's approach is not corrected, the same will be true of Bobby James Moore.

1. *Elroy Chester.*[9] In *Ex parte Chester*, 2007 WL 602607, *2-3 (Tex. Crim. App. Feb 28, 2007), the Texas Court of Criminal Appeals—relying entirely on trial court findings with respect to the *Briseno* factors—upheld a finding that Chester had not demonstrated significant limitations in adaptive behavior. Although the State's expert acknowledged that "a person with [his scores] ... would properly be diagnosed as mildly mentally retarded," *id.* at *3, the court focused on Chester's adaptive strengths, not the extent of his adaptive weaknesses, *id.* at *4, *5 (Chester was "capable of learning if given proper teaching methods" and able to "converse ... coherently on a wide variety of topics," "capable of hiding facts and lying to protect his own interests," and "capable of forethought, planning, and complex execution of purpose"). The court also gave substantial weight to Chester's conduct during the commission of the capital crime, noting, for example, that Chester had attempted to conceal his crime by wearing a mask and gloves. *Id.* at *5-9.

Applying clinical standards in Chester's case instead of focusing narrowly on the facts of the crime would likely have led to a different result. Indeed, while the facts of the murder formed the bulk of the Texas court's analysis, Chester's offense conduct was significantly less sophisticated than similarly situated capital defendants in other States who were found intellectuall. disabled under a proper clinical analysis. *See, e.g.*, *Hughes* v. *Epps*, 694 F. Supp. 2d 533, 536 (N.D. Miss. 2010) (ignoring the fact that Hughes concealed the body when determining adaptive limitations); *Holladay* v. *Campbell*, 463 F. Supp. 2d 1324,

---

[9] Chester's case is discussed at *ABA Texas Assessment* 397-398.

1339, 1346-1347 (N.D. Ala. 2006) (finding deficits in adaptive behavior notwithstanding that the crime demonstrated "premeditation and strategic planning"), *aff'd*, 555 F.3d 1346 (11th Cir. 2009).

2. *Juan Lizcano.*[10] Two psychologists who had evaluated Juan Lizcano agreed that his IQ scores were consistently in the 40s, 50s, or 60s and that he was intellectually disabled based on adaptive deficits in communication, self-care, and functional academics. *Lizcano*, 2010 WL 1817772, at *12-15. One expert observed that, "'[w]hile [Lizcano] possesses some adaptive strengths, this does not negate the evidence of his possessing adaptive deficits.'" *Id.* at*36 (Price, J., concurring and dissenting). Testimony from Lizcano's friends, family, and employer corroborated these deficits. Lizcano did not understand jokes and usually watched children's TV programs. *Id.* at *13-14. According to a girlfriend, Lizcano could not clean himself or take thorough showers, and would wear ill-fitting clothing—including a woman's blouse on one occasion—and had to be prompted to brush his teeth. *Id.* at *38 (Price, J., concurring and dissenting). Lizcano struggled to learn basic tasks and could not read a clock or operate a VCR. *Id.* at *15. A coworker noted that Lizcano was the only person he had ever trained who could not learn how to use a tape measure or a saw. *Id.* at *14.

The prosecution offered no expert testimony to rebut the defense's clinicians. *Lizcano*, 2010 WL 1817772, at *10. However, applying *Briseno*, the court found that

---

[10] Lizcano's case is discussed at *ABA Texas Assessment* 398-399.

> (i) [Lizcano] maintained continuous employment and was recognized by his employers as a hard and reliable worker; (ii) ... made regular payments on a vehicle he purchased as a co-buyer; (iii) ... maintained romantic relationships with at least two women, neither of whom considered him to be mentally retarded and one of whom considered him to be "bright"; and (iv) ... reliably sent significant amounts of money and other items to assist his family.

Id. at *15.

None of this evidence forecloses a finding of intellectual disability under any scientifically valid test of intellectual disability. The evidence used to determine Lizcano's *Atkins* claim all related to his supposed strengths, not his deficits. And even if "a person's strengths in a particular domain [are] relevant to whether the individual has significant limitations in that particular area[,]" *Wiley* v. *Epps*, 668 F. Supp. 2d 848, 902 (N.D. Miss. 2009), the court in Lizcano's case never discussed how any of the evidence before it rebutted the deficits in Lizcano's communication and functional academics. Lizcano was sentenced to death even though defendants with intellectual disability outside of Texas have both managed money and held far more difficult jobs. *E.g.*, *Wiley* v. *Epps*, 625 F.3d 199, 217 (5th Cir. 2010) (defendant who was able to hold down a job, serve in the military, and provide for a family was nonetheless held to have intellectual disability); *Holladay*, 463 F. Supp. 2d at 1339, 1346-1347 (buying and selling cars and spending frugally while on the run did not preclude an intellectual disability).

3. *Marvin Lee Wilson.*[11] Wilson presented the trial court with significant evidence of adaptive behavior limitations. *Wilson* v. *Quarterman*, 2009 WL 900807, at *8 (E.D. Tex. Mar. 31, 2009). His expert witness "testified that [his] composite score of 44 on the Vineland Adaptive Behavior Skill Test was well within retarded range." *Id.* The expert's determination was supported by "affidavits from friends and family members attesting to his difficulties in written communication and understanding money management concepts, his inability to get along with others and avoid being victimized, and his problems with personal hygiene and maintaining employment." *Id.* A childhood friend, for instance, said that Wilson "'would put on his belt so tight that it would almost cut off his circulation'" and that "'[h]e couldn't even play with simple toys like marbles or tops.'" Liptak, *Date Missed, Court Rebuffs Low-I.Q. Man Facing Death*, N.Y. Times, Dec. 17, 2005, at A14. The state presented no evidence in rebuttal. *Id.* Instead, it argued that *Atkins* "'was never intended to protect capital murderers who commit execution-style killings.'" *Id.*

Nevertheless, a Texas court found that Wilson did not have an intellectual disability. As the federal habeas court later explained, "the state court relied on the *Briseno* factors alone, rather than as a supplement to clinical factors, in determining" that Wilson did not have "related, significant deficits in adaptive functioning." *Wilson*, 2009 WL 900807, at *7. The state court's findings were "based on the view that the *Briseno* factors can be used by themselves to establish whether a person has significant deficits in adaptive functioning,

---

[11] Wilson's case is discussed at *ABA Texas Assessment* 399-400.

even if evidence is submitted which is relevant to the AAMR definition of adaptive deficits." *Id.* at *8. The court "did not make explicit findings and reached no explicit conclusion as to whether Wilson had significant limitations in adaptive functioning." *Id.* at *7. Instead, the court relied on the *Briseno* factors as a checklist and applied the factors in place of clinical standards. *E.g.*, *id.* ("Wilson was capable of lying and hiding facts when he felt it was in his best interest; and that the crime at issue showed deliberate forethought, planning, and execution of purpose.").[12]

Wilson's *Atkins* claim was thus denied largely on the strength of evidence relating to his crime itself—evidence that was sufficient under *Briseno*, but that is the antithesis of clinical analysis of adaptive behavior. Such evidence would barely have been probative, let alone dispositive, outside of Texas. Lying and hiding facts are commonplace aspects of capital crimes, whether or not the defendant has intellectual disability. *See, e.g.*, *Nicholson* v. *Branker*, 739 F. Supp. 2d 839, 847 (E.D.N.C. 2010); *Hughes*, 694 F. Supp. 2d at 564.

4. *Bobby James Moore.* In this case, the Texas trial court relied on the AAIDD's current standard for diagnosing intellectual disability in granting relief to Moore. Pet. App. 201a-203a; *see also* Pet. Br. 4-6, 10-17 (describing evidence of Moore's intellectual disability

---

[12] The district court denied federal habeas relief even after finding that Wilson had "presented evidence of significant limitations in all three areas of adaptive functioning: the conceptual domain, the social domain, and the practical domain." *Wilson*, 2009 WL 900807, at *8. It did so because it felt bound to follow the state court's factual findings and adherence to *Briseno*. *Id.* In an unpublished opinion, the Fifth Circuit later declined to hold that use of the *Briseno* factors violates *Atkins*. *Wilson* v. *Thaler*, 450 F. App'x 369, 377 (5th Cir. 2011).

and trial court's analysis). The court found that Moore's IQ test scores, which averaged slightly over 70, established that he has significant limitations in intellectual functioning. Pet. App. 167a. It credited the testimony of Moore's expert witnesses that he "has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean," Pet. App. 201a, including inability to learn from experience, impaired reasoning and judgment, a tendency to be a follower, and difficulties communicating with others, JA11-12, 73-74, 80, 82-85. And it found ample evidence, including Moore's repeated school failures and the familial abuse he received as a child for being "dumb," that Moore's intellectual disability manifested before age 18. Pet. App. 182a-190a, 201a.

The CCA, however, rejected the trial court's conclusion, reasoning that the court had erred by using the AAIDD's current standards for intellectual disability rather than the standards articulated in *Briseno*. Relying only on two of Moore's higher IQ test scores (disregarding the standard error of measurement because of Moore's "history of academic failure") and the fact that he was tested while on death row, it concluded that Moore had not proven significantly subaverage intellectual functioning. Pet. App. 74a-75a; *but see Hall*, 134 S. Ct. at 2001 (holding that "when a defendant's IQ test score falls within the test's ... margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits").

The CCA then determined, based on the *Briseno* factors, that Moore had not shown significant deficits in adaptive functioning because, among other things, Moore had lived in the back of a pool hall, played pool,

mowed lawns for money, and adapted to the prison environment, Pet. App. 80a-88a—none of which is in any way inconsistent with a diagnosis of intellectual disability. Finally, the CCA concluded, with no evidentiary basis, that Moore's adaptive limitations were not "related" to his intellectual deficits, but were caused by other factors, including childhood abuse and academic failure, Pet. App. 88a-89a—factors that *support* a diagnosis of intellectual disability. For Moore, the CCA's refusal to abide by clinical standards for assessing intellectual disability could be the difference between a life sentence and the death penalty.

* * *

By prohibiting courts from using current clinical standards and instead requiring them to use the anti-clinical *Briseno* standard, Texas has withdrawn the protections of *Atkins* from most defendants with intellectual disability. But, as this Court made clear in *Atkins* and *Hall*, *all* persons with intellectual disability, by definition, share characteristics that reduce their moral culpability and require their categorical exclusion from the death penalty. And intellectual disability is determined by reference to *clinical* standards. Texas's contrary approach cannot be tolerated under the Eighth Amendment.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

Of Counsel:
DANIELLE SPINELLI
CATHERINE M.A. CARROLL
ARI J. SAVITZKY
ROBBIE MANHAS

PAULETTE BROWN
Counsel of Record
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654
(312) 988-5000
abapresident@americanbar.org

AUGUST 2016

RECORD AND BRIEFS

No. 15-797

FILED
AUG - 3 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

—v.—

TEXAS,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS, IN SUPPORT OF PETITIONER

Jeffery P. Robinson
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
810 Third Avenue, Suite 500
Seattle, Washington 98104

Rebecca L. Robertson
AMERICAN CIVIL LIBERTIES
UNION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Brian W. Stull
Counsel of Record
Cassandra Stubbs
Anna Arceneaux
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-9469
bstull@aclu.org

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

INTRODUCTION AND STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE *BRISENO* FACTORS UNCONSTITUTIONALLY SEEK TO EXCLUDE "NON-DESERVING" INTELLECTUALLY DISABLED PERSONS FROM *ATKINS* PROTECTION 8

II. THE *BRISENO* FACTORS VIOLATE THE CONSTITUTION BY RELYING ON A STEREOTYPED DESCRIPTION OF INTELLECTUAL DISABILITY MODELED ON STEINBECK'S CHARACTER LENNIE. 14

A. The *Briseno* Factors Impermissibly Rely On Nothing But Stereotypes And Caricature From Literature 15

B. By Relying On Stereotypes, the *Briseno* Factors Lead To Unreliable And Arbitrary Decision Making That Deprives Defendants With Intellectual Disability Of Their Individual Dignity 27

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia,
536 U.S. 304 (2002).....*passim*

Beck v. Alabama,
447 U.S. 625 (1980)..... 7, 27, 30

Brumfield v. Cain,
__ U.S. __, 135 S. Ct. 2269 (2015) 3, 13

Chester v. Thaler,
666 F.3d 340 (5th Cir. 2011) 3, 5, 28

City of Cleburne, Tex. v. Cleburne Living Ctr.,
473 U.S. 432 (1985)..... 15

Ex Parte Briseno,
135 S.W.3d 1 (Tex. Crim. App. 2004).....*passim*

Ex parte Cathey,
451 S.W.3d 1 (Tex. Crim. App. 2014)..... 28

Ex parte Sosa,
364 S.W.3d 889 (Tex. Crim. App. 2012)..... 11

Ford v. Wainwright,
477 U.S. 399 (1986)..... 14

Gregg v. Georgia,
428 U.S. 153 (1976)..... 27, 30

Hall v. Florida,
__ U.S. __, 134 S. Ct. 1986 (2014) .....*passim*

Lizcano v. State, No. AP-75879, 2010 WL 1817772,
(Tex. Crim. App. May 5, 2010) 28

CONSTITUTION & STATUTES

U.S. Const. amend. VIII .....*passim*

U.S. Const. amend. XIV 1, 6, 14, 29

Texas Health & Safety Code § 591.003(13) 11

Texas Penal Code § 19.02 (b)(1) (West 2015)..... 22

Texas Penal Code § 19.03 (West 2015) 22

OTHER AUTHORITIES

Alan Turing, *Steinbeck's Son Joins Fight Over Wilson's Execution*, Beaumont Enterprise (Aug. 7, 2012), http://www.beaumontenterprise.com/news/article/Steinbeck-s-son-joins-fight-over-Wilson-s-3769361.php 18

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* (11th ed. 2010) 15, 21, 26

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Rev. 2000) 9

Dennis Keyes and David Freedman, *Retrospective Diagnosis and Malingering, in The Death Penalty and Intellectual Disability* (Edward Polloway ed. 2015)..... 26

Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues*, 16 App. Neuropsych. 91 (2009)..... 9

Gary Siperstein & Melissa Collins, *Intellectual Disability, in The Death Penalty and Intellectual Disability* (Edward Polloway ed. 2015)..... 9, 15, 26

J. Gregory Olley, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 Applied Neuropsychology 135 (2009) 9

James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985) 26

John Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. Law & Pub. Pol'y 689 (2009) 28

John Blume & Karen Salekin, *Analysis of* Atkins *Cases, in The Death Penalty and Intellectual Disability* (Edward Polloway ed. 2015) 15, 16

John Blume et al., *A Tale of Two (And Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. 393 (2015) 28

John Steinbeck, *Of Mice and Men* (Bantam Books Mass Market Paperback 1981) .....*passim*

Julia Barton, *Judging Steinbeck's Lennie, Life of the Law*, (Sept. 3, 2013), http://www.lifeofthelaw.org/2013/09/judging-steinbeck-lennie/ 17

Michael Rutter, Emily Simonoff & Robert Plomin, *Genetic Influences on Mild Mental Retardation: Concepts, Findings and Research Implications*, 28 J. Biosocial Sci. 509 (Oct. 1996) 25

Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1 (2011) ... 28

Robert Mackey, *Steinbeck Family Outraged That Texas Judge Cited 'Of Mice and Men' in Execution Ruling*, N.Y. Times (Aug. 8, 2012), http://thelede.blogs.nytimes.com/2012/08/08/steinbeck-family-outraged-texas-judge-cited-of-mice-and-men-in-execution-ruling/?_r=0 17

Stephen Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual, in American Association on Mental Retardation, What is Mental Retardation? Ideas for an Evolving Disability in the 21st Century* (2006) 28

Stephen Greenspan, *The* Briseno *Factors, in The Death Penalty and Intellectual Disability* (Edward Polloway ed. 2015) 16, 28

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Texas is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in considering the constitutionality of Texas's procedures for identifying people with intellectual disability who are exempt from execution under the Eighth and Fourteenth Amendments. Given the ACLU's longstanding interest in the protections contained in the Constitution, including the Eighth Amendment's prohibition against cruel and unusual punishment, the proper resolution of this case is a matter of substantial importance to the ACLU, its affiliates, and its members.

INTRODUCTION AND STATEMENT OF THE CASE

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), this Court held that persons with intellectual disability have diminished moral culpability and thus may not be sentenced to death under the Constitution.[2] In reaching this conclusion, the Court

---

[1] Letters of consent from the parties have been submitted to the Clerk of the Court. No party has authored this brief in whole or in part, and no one has made a monetary contribution intended to fund the preparation or submission of this brief, other than amici, its members, and its counsel.

[2] "Intellectual disability" is the term now used to describe what was previously referred to as mental retardation. *Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 1990 (2014). This brief uses

relied on a clinical definition of intellectual disability that rests on three findings: (a) significantly subaverage intellectual functioning; (b) significant limitations in adaptive skills; and (c) the manifestation of these deficits prior to the age of 18. *Id.* at 308 n.3, 318.

Texas acknowledges this Court's holding in *Atkins*. *Ex Parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). But, it has adopted a flawed interpretation of *Atkins* that permits the execution of individuals who are in fact intellectually disabled and that *Atkins* intended to exempt from the death penalty. To qualify for an *Atkins* exemption in Texas, it is not enough for a defendant to demonstrate that he is intellectually disabled, as that term is understood by the medical profession. An intellectually disabled defendant facing the death penalty in Texas must also show "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Ex Parte Briseno*, 135 S.W.3d at 6.

In other words, the *Atkins* inquiry in Texas does not turn on clinical criteria to establish that the defendant is intellectually disabled, but on whether the defendant is intellectually disabled enough to convince "a consensus of Texas citizens" that it would be wrong to impose a sentence of death. Under *Briseno*, a person who meets the clinical definition of intellectual disability may still be eligible for the death penalty if he fails to prove that his adaptive

---

the current term, except when quoting from older opinions or materials that used "mental retardation."

deficits are *not* indicative of a personality disorder. *Id.* at 8-9.[3]

As an example of a person "[m]ost Texas citizens might agree . . . should . . . be exempt" from the death penalty, *Briseno* invokes the character Lennie from John Steinbeck's *Of Mice and Men*. *Id.* at 6. Drawing guidance from this fictional character, rather than science, *Briseno* then announces a series of "evidentiary factors" for Texas courts to consider in applying *Atkins*:

> • Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?

---

[3] It is unclear why the CCA in *Briseno* raised the specter of prisoner personality disorders masking as intellectual disability. As shown below, the two are not inconsistent. *See Brumfield v. Cain*, __ U.S. __, 135 S. Ct. 2269, 2280 (2015). That may explain why the *Briseno* factors in subsequent decisions were often used to evaluate the sufficiency of a prisoner's adaptive deficits, rather than as a way of excluding those whose deficits were attributable exclusively to personality disorder. *See, e.g., Chester v. Thaler*, 666 F.3d 340, 346 (5th Cir. 2011) (describing factors as a means "to flesh out the [American Association on Mental Retardation (AAMR)] definition to determine whether the convict falls within *Atkins* so as to be protected against the death penalty"). Indeed, below, the CCA applied the *Briseno* factors even though no party had alleged that Moore suffered from a personality disorder. Pet. App. 161a-162a, ¶94. Under either approach, the factors find no support in science.

- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id. at 8-9.

These factors closely reflect not science, but the characteristics of the hulking farmhand Lennie, who appears in the novella to have a severe form of disability. Lennie (or someone like him) easily meets the first factor, and each subsequent factor proposes an ability that Lennie would not have, contrasted against a deficit that he would have. As shown in greater detail in this brief, throughout the novel, Lennie acts on impulse, not plans, including at the climax when he commits a homicide. Rather than a leader, he is the classic follower, forever imitating his

travel partner (and caretaker) George. Lennie responds irrationally to stimuli, driven by an obsession to care for and touch soft things. He cannot carry on rational conversations, but instead often returns to the topic of his obsession. Every lie Lennie tells (most involving hiding his obsession with furry animals) is readily transparent and instantly spotted by George. Texas has derived its *Briseno* factors from these stereotypes of people with intellectual disability like Lennie.

As applied in Texas, anecdotal evidence of any of the "abilities" set out in the *Briseno* factors weighs against a finding of intellectual disability. *See, e.g.*, *Chester*, 666 F.3d at 348-49 (acknowledging the evidence of prisoner's subaverage intellectual functioning and onset of condition before age 18 but rejecting prisoner's ample evidence of significant adaptive deficits under accepted clinical standards by relying instead, under *Briseno*, on evidence from the crime showing prisoner could "plan, avoid detection, and lie[,]" and attempt (unsuccessfully) to escape from the police, as well as expert testimony that he could communicate clearly).

The CCA in this case relied in part on the *Briseno* factors to deny Petitioner relief. Pet. App. at 89a-91a. In so doing, it rejected the dissent's call "to reevaluate the decade-old, judicially created standard in *Ex parte Briseno*," as inconsistent with both medical science, including current medical standards, and the approach recently taken by this Court in *Hall*, 134 S. Ct. at 1993-96. Pet. App. at 94a.

The dissent's critique also zeroed in on Steinbeck's Lennie: "In referring to Lennie as someone who might be exempt from execution

whereas others unlike him would not be, this Court's opinion has been read as implying or holding that those individuals who are less than severely or profoundly intellectually disabled would not be exempt from execution." Pet. App. at 117a. The dissent then went on to explain, "the Lennie standard does not meet the requirements of the federal Constitution because it . . . categorically limits the protections of the Eighth Amendment to those offenders determined to be severely or profoundly intellectually disabled." Pet. App. at 118a.

For economy, *Amici* adopt the additional facts set forth in Petitioner's merits brief concerning his intellectual disability and the proceedings below.

SUMMARY OF ARGUMENT

Under this Court's precedent, the Eighth and Fourteenth Amendments forbid the execution of any person with intellectual disability. *See Atkins*, 536 U.S. at 321; *Hall*, 134 S. Ct. at 1990. Under Texas precedent, however, persons with intellectual disability face an unacceptable and therefore unconstitutional risk of execution. *See Ex Parte Briseno*, 135 S.W.3d at 8-9 (setting forth seven-factor, judge-made test, commonly referred to as "the *Briseno* factors"). The CCA set out its *Briseno* factors to provide guidance on an impermissible Texas-specific application of *Atkins*. *Id.* at 6 (purporting to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty").

Rather than resting on the "views of medical experts," *Hall*, 134 S. Ct. at 2000, the *Briseno* factors

reflect a damaging and inaccurate stereotype drawn from literature. Because offenders with intellectual disability who have committed capital crimes virtually all fall in the mild range of disability, *see* notes 6&7, *infra*, the patently-disabled person who matches this literary stereotype and qualifies for relief would be rare. And, as shown in greater detail below, this stereotype appears to be based on Lennie, the slow-witted, lumbering giant, who is a classic follower, given to poor judgment, incoherent speech, and acts based on impulse and irrational fantasy.

Petitioner and other *amici* persuasively show that the criteria used by the CCA to deny *Atkins* relief clash with science and medicine. We do not repeat those arguments here. Instead, this brief focuses on the consequences of the decision that Texas has made. First, reliance on the *Briseno* factors unconstitutionally excludes persons with mild intellectual disability from *Atkins*' protection. Second, and relatedly, the *Briseno* factors undermine the reliability and fairness required in capital procedures, create arbitrary outcomes, and trample the dignity of persons seeking *Atkins* relief.

The death penalty must be based on reason, not caprice. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (citations omitted). Persons with intellectual disability facing execution thus "must have a fair opportunity to show that the Constitution prohibits" the death penalty in their cases. *Hall*, 134 S. Ct. at 2001. Further, although the "States are laboratories for experimentation," such experiments "may not deny the basic dignity the Constitution protects." *Id.* Based in stereotypes, imagination, and literary

caricature, the *Briseno* factors mock these constitutional tenets of our justice system.

Because the CCA unconstitutionally relied in part on the *Briseno* factors to deny petitioner *Atkins* relief,[4] its judgment should be vacated. The case should be remanded to afford petitioner a new and fair opportunity to pursue his *Atkins* claim.

ARGUMENT

I. THE *BRISENO* FACTORS UNCONSTITUTIONALLY SEEK TO EXCLUDE "NON-DESERVING" INTELLECTUALLY DISABLED PERSONS FROM *ATKINS* PROTECTION.

Briseno's fundamental premise is that, in the absence of contrary guiding legislation, Texas may execute certain persons with mild intellectual disability. 135 S.W.3d at 6-8. (citing, *inter alia*, lack of legislation implementing *Atkins*).[5] Its rationale is that the Eighth Amendment does not necessarily bar such executions. *Id.* at 5. The tool proposed to

---

[4] *See* Pet. App. at 89a-91a (applying *Briseno* factors to buttress conclusion Petitioner is not disabled). As Petitioner's brief explains, the problems in the CCA's ruling below go beyond application of the *Briseno* factors. The ruling also errs in other parts of the intellectual disability determination, all of which fall under the rubric of a refusal to apply current medical standards.

[5] While the CCA continued in the decision below to place great weight on the failure of the Texas Legislature to act to implement *Atkins*, Pet. App. at 5a,7a, the dissent correctly noted that the court was abdicating its own "responsibility to ensure that federal constitutional rights are fully protected in Texas." Pet. App. at 95a n.2.

accomplish the macabre task of sorting between those persons with intellectual disability who "deserve" the death penalty and those who do not is the seven-factor test announced in *Briseno*. *Id.* at 8-9.

Briseno, however, is faulty in its premise, in its rationale, and in its supposition that the Texas courts may, with their own judge-made standards, sort those deserving of execution from those who are not.

To begin, the CCA in *Briseno* misinterpreted *Atkins* as permission for Texas to execute people with mild intellectual disability. This is startling: Not only do the overwhelming majority of persons with intellectual disability fall in the mild range,[6] but also people with moderate or severe disability would rarely, if ever, have the capacity to commit capital crimes.[7] The CCA found permission to exclude those with mild intellectual disability based on a faulty chain of reasoning. First, it quoted this observation from *Atkins*: "'[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.'" 135

---

[6] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 43 (4th ed. Text Rev. 2000) (placing the figure at 85%); Gary Siperstein & Melissa Collins, *Intellectual Disability, in The Death Penalty and Intellectual Disability* 21 (Edward Polloway ed. 2015) (placing the figure at 89%).

[7] J. Gregory Olley, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 Applied Neuropsychology 135,136-37 (2009); Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues*, 16 App. Neuropsych. 91, 92 (2009).

S.W.3d at 5 (quoting *Atkins*, 536 U.S. at 317). It then quoted this Court's directive tasking the States with "'developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" *Id.* (quoting *Atkins*, 536 U.S. at 317).

Next, the CCA noted the "large and diverse population suffering from some sort of mental disability" and the four subcategories of mental retardation, including "mildly mentally retarded, moderately mentally retarded, severely mentally retarded, and profoundly mentally retarded," *Id.* at 5. "Some 85% of those officially categorized as mentally retarded," the court noted, "fall into the highest group, those mildly mentally retarded[.]" *Id.*

The CCA noted that the "functioning level of those who are mildly mentally retarded is likely to improve with supplemental social services and assistance." *Id.* at 6. It then speculated – without citation or authority – that it is "understandable that those in the mental health profession should define mental retardation broadly to provide an adequate safety net for those who are at the margin and might well become mentally-unimpaired citizens if given additional social services support." *Id.*

Having laid this foundation, the CCA concluded that the court *itself* must "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.* The CCA believed the question remained open whether there is "a national or Texas consensus that *all of those persons* whom the mental health profession might diagnose as meeting the criteria for mental retardation" must be spared execution. *Id.*

(emphasis added). The court declined to adopt such a "bright-line exemption[,]" without "significantly greater assistance from the citizenry acting through its Legislature." *Id.* at 6. *See also Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) ("Answering questions about whether the defendant is mentally retarded for particular clinical purposes is instructive as to whether the defendant falls into the 'range of mentally retarded offenders' protected by the Eighth Amendment, but it will not always provide a conclusive answer to that ultimate legal question.").

The CCA in *Briseno* recognized that the Texas Legislature had *already* defined intellectual disability in other contexts. 135 S.W.3d at 7 (citing Tex. Health & Safety Code § 591.003(13) (defining intellectual disability as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period")). But, it questioned the use of a definition in the *Atkins* context "for providing psychological assistance, social services, and financial aid," *id.* at 8, and noted that legislation adopting this statutory definition in the capital context had been vetoed by Texas's Governor. *Id.* at 6. Instead, the CCA stated that, absent legislation, it would apply the statute's criteria, or the similar criteria of the AAMR[8] – yet with a critical qualification lacking any basis in science. *Id.* at 8.

---

[8] In practice, however, Texas has not faithfully applied the up-to-date criteria of the AAMR (which later became the American Association on Intellectual and Developmental Disabilities (AAIDD)), the statute, or other relevant professional

That qualification is to apply the seven unscientific *Briseno* factors. *See* pp. 3-4, *supra*. Thus, the CCA – again without citation or authority – found that "adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases." *Id.* It then listed the "evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder," *id.*, even though the presence or absence of a personality disorder is medically irrelevant to the diagnosis of intellectual disability. *See* n.3, *supra*.

Briseno's reasoning is faulty in both its premise and its conclusion. Nothing in the *Atkins* decision, or this Court's decisions applying *Atkins*, stands for the proposition that some or all of those with mild intellectual disability are ineligible for the *Atkins* exemption from execution. The portions of *Atkins* the CCA quoted merely indicate that a *claim* of intellectual disability in the state courts is subject to adjudication under state-court procedures. *Atkins*, 536 U.S. at 317. Deciding who is intellectually disabled is very different from disqualifying those who are intellectually disabled from the constitutional protection that *Atkins* provides. In *Atkins* itself, the death-row petitioner was "'mildly mentally retarded,'" 536 U.S. at 308, and the thrust of the dissent was that the majority was going too far in exempting from execution those with mere "mild" disability. *Id.* at 338-42 (Scalia, J., dissenting). All of

---

organizations concerned with intellectual disability. The briefs of Petitioner and other *amici* illustrate these failures in detail.

this would have been academic, not to mention confusing, if the Court had meant for the new categorical exemption from execution to *exclude* some or all of those with mild intellectual disability.

The Court reaffirmed this approach in *Brumfield*, 135 S. Ct. at 2278, finding the petitioner, with a "reported IQ test result of 75 . . . squarely in the range of potential intellectual disability." *Id.* (citing, *inter alia*, *Atkins*, 536 U.S. at 309 n.5). The Court ruled that Brumfield had been improperly denied a hearing on his *Atkins* claim, a ruling that would be inexplicable if *Atkins* could be read to allow the execution of those with mild intellectual disability. *See also Hall*, 134 S. Ct. at 2001 ("Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test.").

The Court in *Brumfield* also debunked the suggestion in *Briseno* that the *Atkins* protections do not apply to those whose adaptive deficits could be attributed to "a personality disorder." *Ex parte Briseno*, 135 S.W.3d at 6. As *Brumfield* makes clear, "an antisocial personality is not inconsistent with any of the above-mentioned areas of adaptive impairment, or with intellectual disability more generally." *Brumfield*, 135 S. Ct. at 2280 (citing clinical definitions and criteria).

Finally, the Constitution forecloses Texas's attempt, post-*Atkins*, to "define that level and degree of mental retardation at which a consensus of *Texas* citizens would agree that a person should be exempted from the death penalty." *Ex parte Briseno*, 135 S.W.3d at 6 (emphasis added). Texas, after all, was one of the states – running against the national consensus recognized in *Atkins* – that had failed to

pass legislation exempting those with intellectual disability from execution. *Ex parte Briseno*, 135 S.W.3d at 6 (noting Governor's veto of 2001 legislation that would have exempted those with intellectual disability from execution); *Atkins*, 536 U.S. at 315 n.16 (same).

No state holds authority to substantively define the contours of the Eighth and Fourteenth Amendment protections this Court recognized in *Atkins*. The Court in *Atkins* acted precisely because it determined there was a national consensus against the execution of those with intellectual disability, even considering that certain jurisdictions, like Texas, still retained the death penalty for this population. *Id.* at 316-17. It is antithetical to the Court's careful Eighth Amendment jurisprudence to afford the very states with whom the Court was disagreeing the authority to redefine what should be a categorical exemption from execution. *See also Hall*, 134 S. Ct. at 1998 ("*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.").

II. THE *BRISENO* FACTORS VIOLATE THE CONSTITUTION BY RELYING ON A STEREOTYPED DESCRIPTION OF INTELLECTUAL DISABILITY MODELED ON STEINBECK'S CHARACTER LENNIE.

The Constitution limits Texas's authority to "'develop[] appropriate ways to enforce the constitutional restriction'" against the execution of those with intellectual disability. *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). *See Hall*, 134 S. Ct. at 1998 (noting the

states' discretion is not "unfettered"). As shown below, the *Briseno* factors ignore these limits. By relying on stereotype, fiction, and caricature, they promote unreliable and arbitrary outcomes, and deny defendants seeking *Atkins* protection the inherent dignity guaranteed to all persons by the Constitution.

A. The *Briseno* Factors Impermissibly Rely On Nothing But Stereotypes And Caricature From Literature.

For those with intellectual disability, "much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to prolonged social and cultural isolation [of persons with intellectual disability] . . . continue to stymie recognition of [their] dignity and individuality." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 467 (1985) (Marshall, J., concurring and dissenting). The common stereotype is of a person with profound and obvious mental deficits, sometimes physically evident. The incorrect perception is that these "individuals never have friends, jobs, spouses, or children or are good citizens." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* 151 (11th ed. 2010). A person with Down Syndrome may come to mind, or perhaps one who cannot wash or dress herself, or handle money. *See* Gary Siperstein & Melissa Collins, *Intellectual Disability, supra,* at 21, 29. He may be described as "quiet, timid, unintelligent, abnormal, strange, helpless, and clumsy[.]" John Blume & Karen Salekin, *Analysis of* Atkins *Cases, in The Death Penalty and Intellectual*

Disability 37, 43. The model is a person dependent on others, with awkward speech patterns and odd mannerisms. *Id.*

Popular culture reinforces these images in our collective consciousness. Title characters from the cinema exemplify the pervasive stereotype, such as *Forrest Gump* with Tom Hanks,[9] and *I am Sam* with Sean Penn.[10] In the 1981 CBS television drama, *Bill,* Mickey Rooney played Bill Sackter, a formerly institutionalized man, with an IQ of 50, who survives with the help of a kind family he meets in the community.[11] Corky from the TV show *Life Goes On* provides the example of a lovable teen with Down Syndrome.

For the author of the *Briseno* opinion, Judge Cathy Cochran (now retired), the classic example was a character with severe disability, Lennie, in John Steinbeck's *Of Mice and Men* (1937). *See Ex parte Briseno,* 135 S.W.3d at 6 & n.19 (citing Lennie as a person "[m]ost Texas citizens might agree . . . should . . . be exempt").

In a 2013 interview about this reference, Judge Cochran explained that, as a child, she lived in rural California and, as a young woman, she lived in Monterey, above Cannery Row (title of and inspiration for another Steinbeck novel). *See* Julia Barton, *Judging Steinbeck's Lennie, Life of the Law,*

---

[9] Blume & Salekin, *Analysis of* Atkins *Cases, in The Death Penalty and Intellectual Disability* 41.

[10] Stephen Greenspan, *The* Briseno *Factors, in The Death Penalty and Intellectual Disability* 219, 226.

[11] *Id.* at 226.

(Sept. 3, 2013), http://www.lifeofthelaw.org/2013/09/judging-steinbeck-lennie/. Judge Cochran recalled that while living above Cannery Row, she "re-read all of Steinbeck[.]" *Id.* When she later authored the *Briseno* opinion she thought of Lennie, "sort of the gentle giant" who did not "realiz[e] what he was doing, not knowing the consequences[.]" *Id.* Judge Cochran said she believed "that's part of what was behind the *Atkins* case as well[.]" *Id.*

Judge Cochran explained in the interview that, in writing *Briseno*, and trying to reconcile Texas law and the professional definitions of intellectual disability, Lennie came to mind. *Id.* [12]

---

[12] Responding to Judge Cochran's comments, Steinbeck's son, Thomas, stated:

> I had no idea that the great state of Texas would use a fictional character that my father created to make a point about human loyalty and dedication, i.e., Lennie Small from "Of Mice and Men," as a benchmark to identify whether defendants with intellectual disability should live or die.
>
> My father was a highly gifted writer who won the Nobel Prize for his ability to create art about the depth of the human experience and condition. His work was certainly not meant to be scientific, and the character of Lennie was never intended to be used to diagnose a medical condition like intellectual disability. I find the whole premise to be insulting, outrageous, ridiculous and profoundly tragic. I am certain that if my father, John Steinbeck, were here, he would be deeply angry and ashamed to see his work used in this way.

See Robert Mackey, *Steinbeck Family Outraged That Texas Judge Cited 'Of Mice and Men' in Execution Ruling*, N.Y. Times (Aug. 8, 2012), http://thelede.blogs.nytimes.com/2012/08/08/steinbeck-family-outraged-texas-judge-cited-of-mice-and-men-in-execution-ruling/?_r=0. *See also* Alan Turing, *Steinbeck's Son*

Judge "Cochran believe[d] her ruling balances criminals' claims of mental retardation against a Texas culture that encourages speedy executions." *Id.*

As Judge Cochran's interview suggested, the Lennie reference was not merely "an attempt to write colorfully gone awry[.]"Pet. App. at 116a (Alcala, J., dissenting). Rather, it was a directive that, in Texas, only "the most profoundly disabled" and some of those "moderately disabled" would be entitled to *Atkins* protection. The "opinion has been read as implying or holding that those less than severely or profoundly intellectually disabled would not be exempt from execution." Pet. App. at 117a.

Steinbeck's Lennie is a powerfully-built, but mentally-deficient, itinerant ranch hand. He partners with George, a fellow laborer in whose care Lennie's Aunt Clara had left him before she died. The pair is driven by a dream, frequently sketched out by George: they will save their meager earnings to one day buy their own farm together, and become their own bosses. For Lennie, the most important part of this dream is that George will allow him to care for a clutch of furry rabbits. Lennie's obsession with the rabbits, and with petting other things furry and soft, drives the story, causes much of his troubles, and leads to the tragic climax.

Lennie becomes frightened because he has accidentally killed a furry farmyard puppy he had

---

Joins Fight Over Wilson's Execution, Beaumont Enterprise, (Aug. 7, 2012), *available at* http://www.beaumontenterprise.com/news/article/Steinbeck-s-son-joins-fight-over-Wilson-s-3769361.php.

been given as a gift on a ranch they were working. John Steinbeck, *Of Mice and Men* 92-93 (Bantam Books Mass Market Paperback 1981). Alone in a barn, the puppy's death still a secret, he complains to the dead pup, "'Now maybe George ain't gonna let me tend no rabbits, if he fin's out you got killed.'" *Id.* at 93. The lonely wife of the ranch boss's son discovers Lennie in his despair, and tries to comfort him, inviting Lennie to touch her soft hair, "'Feel right aroun' there an' see how soft it is.'" *Id.* at 99. When the woman screams because Lennie musses her hair, Lennie cups her mouth and begs her to stop. "George gonna say I done a bad thing. He aint' gonna let me tend no rabbits." *Id.* at 100. He then becomes angry, shakes her, breaks her neck, and thereby kills her. *Id.* All the while, Lennie protests that the screaming will land him in trouble with George.

The depiction of Lennie in the novella is reflected throughout the *Briseno* factors. *See also* Pet. App. at 118a (Alcala, J., dissenting) (referring to "Lennie standard"). For ease of reference, here, again (with numbers added), are the seven factors:

> (1) Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?
>
> (2) Has the person formulated plans and carried them through or is his conduct impulsive?

(3) Does his conduct show leadership or does it show that he is led around by others?

(4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

(5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

(6) Can the person hide facts or lie effectively in his own or others' interests?

(7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Ex Parte Briseno, 135 S.W.3d at 8-9.

The factors reflect a stereotype of intellectual disability consistent with moderate or severe disability. Those with severe or even moderate intellectual disability, including Lennie, would almost certainly meet the first factor. The remaining factors all involve tasks and abilities that would be all but impossible to perform for those with severe or even moderate intellectual disability, and, of course, impossible to perform for Lennie.

The second factor measures the ability to carry out plans, as compared to acting on impulse, while the fourth asks whether conduct is rational and

appropriate. Lennie is the classic example of the person who acts on irrational impulse, rather than careful planning. He killed his victim, not by plan, but in an impulsive and irrational attempt to try to silence her to keep alive his dream of caring for the rabbits. *Of Mice and Men*, at 99-100. Similarly, Lennie smacked his puppy when the puppy "made like he's gonna bite me." *Id.* at 95. This impulsive smack killed the pup. In an earlier incident, he scared a girl whose velvet dress he was clutching. *Id.* at 12. Here, again, his actions bespoke impulsiveness, if not irrationality, and certainly no plan to frighten the girl. *Id.* at 12.

Lennie's tendency towards impulse and irrationality rather than planning is the stuff of stereotype (one, again, based on someone with a severe level of disability). But irrationality and impulsiveness are irrelevant to a valid diagnosis of intellectual disability.[13]

---

[13] As shown more fully in the Brief for AAIDD as *Amicus Curiae*, there are many reasons the *Briseno* factors do not comport with medical and scientific approaches to intellectual disability. With respect to the six factors measuring various abilities, as the dissent below recognized, "weighing of positives against negatives is unlike a scientific determination of adaptive deficits, which looks solely at a person's inability to perform certain functions." Pet. App. at 119a (Alcala, J., dissenting). *See also* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* 7 (11th ed. 2010) (noting the following key assumption concerning the criterion of significant limitations in adaptive behavior: "Within an individual, limitations often coexist with strengths. This means that people with ID are complex human beings who likely have certain gifts as well as limitations . . . . Individuals may have capabilities and strengths that are independent of their ID (e.g., strengths in social or physical capabilities, some adaptive skill

The seventh factor asks a similar question – whether the capital offense itself involves planning, forethought, and purpose. Again, Lennie's killing evinces absolutely none of these capabilities.[14] Nor would a person fitting the common stereotype of disability be expected to possess them. *See* note 7, *supra*.

The third factor asks whether the person leads or is led by others. It is tailor made for Lennie. In the opening scene, Lennie follows George to the lake, where they will rest for the night. At the lake, Lennie "imitated George exactly" in his face-washing routine:

> [George] threw a scoop of water into his face and rubbed it about with his hand, under his chin and around the back of his neck. Then he replaced his hat, pushed himself back from the river, drew up his knees and embraced them. Lennie, who had been watching, imitated George exactly. He pushed himself back, drew up his knees, embraced them, looked over to George

---

areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation).") (internal quotation marks omitted)).

[14] For this and other reasons, Lennie's killing would not even qualify as capital murder in Texas. *See* Texas Penal Code § 19.02 (b)(1) (West 2015) (requiring a knowing or intentional killing for murder); Texas Penal Code § 19.03 (West 2015) (requiring for *capital* murder, a murder under § 19.02 (b)(1), plus one (or more) of several special circumstances, such as the victim is a child, police officer, judge, more than one person, or committed during the course of another felony).

> to see whether he had it just right. He pulled his hat down a little more over his eyes, the way George's hat was.

Of Mice and Men, at 3-4. As the pair later settled to relax that evening, "George lay back on the sand and crossed his hands under his head, and Lennie imitated him, raising his head to see whether he were doing it right." *Id.* at 7.

The next day, at the farm's bunkhouse, "George lifted his tick [mattress] and looked underneath it. He leaned over and inspected the sacking closely. Immediately Lennie got up and did the same with his bed." *Id.* at 21.

The fifth factor looks for rational and coherent communication, as opposed to responses wandering from subject to subject. Lennie, of course, lacks this ability. On a night when George leaves the farm for town, Lennie finds himself lonely and finally in conversation with Crooks, a black man who works in the stable. *Id.* at 76. Hearing the racial angst Crooks describes of his life as the only black person on a segregated farm, all Lennie can do is keep asking when George will return. *Id.* at 80.

Later, when Crooks reminisces about his life as a child when his family worked their own farm, Lennie's contribution is this: "George says we're gonna have alfalfa for the rabbits." *Id.* at 81.

Back at the lake in the opening scene, George is telling Lennie that his Aunt Clara would not want him to run off on his own. Lennie responds, "Tell me – like you done before . . . About the rabbits." *Id.* at 14.

The sixth factor looks at a person's ability to hide facts or lie. This factor, too, appears written with Lennie as the paradigm of severe disability. In the opening scene, Lennie secretly carries a dead mouse in his pocket, whose fur he is stroking. He tries to keep this fact from George, knowing he would not approve. But George of course is on to him, and tells Lennie to hand it over so he can throw it out. Lennie protests, "'I ain't got nothin', George. Honest.'" *Id.* at 5. George sees Lennie's lie, demands the mouse, and then throws it towards the water. *Id.* at 6. Moments later, Lennie tries to retrieve his dear dead mouse without George noticing, again lies to conceal it, and again George seizes it to throw it away. *Id.* at 9-10.

A similar scene replays when Lennie defies George to sneak his cute new puppy away from its nursing mother and the litter, into the bunk house. Lennie lies on his bunk, facing the wall, cradling the pup to his chest. When George reminds Lennie he had told him not to bring the pup into the bunk house, Lennie cries, "What pup, George, I ain't got no pup." *Id.* at 47. George promptly approaches Lennie's bunk, turns Lennie towards him, and grabs the pup from his hiding spot. *Id.*

Modeled on Lenny, these six *Briseno* factors exemplify a stereotype, based on the capabilities of persons with severe disability. But they find no support in science. *See* note 13, *supra* (explaining the analysis is to measure significant deficits not to weigh positive capabilities against negatives).

The first *Briseno* factor involves a different mode of analysis. It inquires not into abilities, but the perception of others. When the defendant was a

child, did the people who knew him best think he was intellectually disabled and act in accordance? This includes "family, friends, teachers, employers, authorities." *Ex Parte Briseno*, 135 S.W.3d at 8.

Here, again, Lennie seems to readily qualify, and to represent the stereotype. In the depression era, Lennie's Aunt Clara left him in the care of George before she died because he could not care for himself. *Of Mice and Men*, at 14, 44. She told Lennie "'Min' George because he's such a nice fella an' good to you.'" *Id.* at 111.

But stereotypes are not science. This factor improperly elevates family members, friends, and others to the level of experts. For people who are moderately, severely, or profoundly disabled, it is of course likely that teachers, friends, and loved ones would notice the disability, as Aunt Clara and George did. There are reasons mild intellectual disability, however, may not come to the attention of family members or even educators. For one, many people with intellectual disability also come from families with low intellectual functioning or even disability, where mild intellectual disability is not recognized.[15] Second, even without their own disabilities, family, friends, and even educators may not know how to identify behavior that would

---

[15] See, e.g., Michael Rutter, Emily Simonoff & Robert Plomin, *Genetic Influences on Mild Mental Retardation: Concepts, Findings and Research Implications*, 28 J. Biosocial Sci. 509, 509 (Oct. 1996) ("It has long been known that mild mental retardation . . . shows a strong tendency to run in families and that there is a much increased recurrence risk if either a parent or a sibling has mental retardation.").

suggest intellectual disability, particularly in the mild range, and could miss it for myriad of reasons.[16]

Third, the common stereotype of intellectual disability – as a Lennie or a Forrest Gump – can cause shame and discourage reporting. Persons with mild intellectual disability, their family members, and even educators, may thus be motivated to avoid the label.[17] The first *Briseno* factor therefore

---

[16] "Frequently," those with mild intellectual disability "have no identifiable cause for the disability, they are physically indistinguishable from the general population, they have no definite behavioral features, and their personalities vary widely, as is true of all people." *Intellectual Disability: Definition, Classification, and Systems of Support* 151.

[17] As mental health professionals have long understood, "because of the powerful stigma attached to mental illness or developmental disabilities, [affected] individuals and their families will take extreme measures to hide those disabilities." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 430-31 (1985). Moreover, "[d]iagnoses of children who have ID may be erroneous for many reasons; but one significant reason is parental reluctance to accept, and teacher/psychologist reluctance to give, a label (e.g., 'mentally retarded') that may persist throughout a child's life and may have many negative consequences[.]" Dennis Keyes and David Freedman, *Retrospective Diagnosis and Malingering, in The Death Penalty and Intellectual Disability* 263, 265. Educators may consider such labels "derogatory and of limited educational value," and thus may use less-objectionable alternatives. *Id.* *See also* Siperstein & Collins, *Intellectual Disability, in The Death Penalty and Intellectual Disability* 29 ("Despite the importance of early intervention, there is often reluctance to diagnose a child with ID, as parents do not perceive their child's impairment to be significant enough to warrant diagnosis."); *Intellectual Disability: Definition, Classification, and Systems of Support* 160 (similar).

potentially excludes defendants from *Atkins* protection who sought as children (or whose families sought) to avoid the negative stereotypes associated with intellectual disability. As shown above, these are stereotypes the *Briseno* opinion itself perversely reinforces.

B. By Relying On Stereotypes, the *Briseno* Factors Lead To Unreliable And Arbitrary Decision Making That Deprives Defendants With Intellectual Disability Of Their Individual Dignity.

Texas may not impose hurdles on prisoners seeking *Atkins* protection that "deny [them] the basic dignity the Constitution protects." *Hall*, 134 S. Ct. at 2001. It may not impose hurdles that render the *Atkins* inquiry unreliable, as based on a factfinder's caprice or whimsy. *See Beck*, 447 U.S. at 638 ("To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.") (internal quotation marks and citation omitted). And it may not rely on a procedure that introduces arbitrariness into the question of who lives and who dies. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).[18]

---

[18] As shown in Petitioner's merits brief and other *amicus curiae* briefs, Texas also may not continue to "disregard [the] informed assessments" of medical experts. *Hall*, 134 S. Ct. at 2000. *Amici* acknowledge those important arguments but do not repeat them in the complementary presentation here.

The *Briseno* factors flunk all of these tests because they rest on a stereotyped view of the capabilities of people who are intellectually disabled, based if anything on a caricature from literature.

As judges dissenting from their application have explained, the *Briseno* factors are "decidedly non-diagnostic,"[19] afford Texas judges "amorphous latitude . . . to supply the normative judgment to say, in essence, what mental retardation means in Texas (and, indeed, in the individual case) for Eighth Amendment purposes[,]"[20] and render the *Atkins* "protection meaningless" because they are not "moored to a generally agreed upon definition of 'mental retardation.'"[21] By contrast, this Court's *Atkins* decision to exempt categorically those with intellectual disability from the death penalty rested on the recognition that factfinders may not always treat the disability as mitigating. 536 U.S. at 320-21.

---

[19] *Ex parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring in part).

[20] *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting).

[21] *Chester*, 666 F.3d at 367, 371 (Dennis, J., dissenting). *See also* John Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. Law & Pub. Pol'y 689, 710-17 (2009); Blume et al., *A Tale of Two (And Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. 393, 399-400 (2015); Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 149-66, 173-74 (2011); Stephen Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, in AAMR, What is Mental Retardation? Ideas for an Evolving Disability in the 21st Century 291 (2006); Greenspan, *The* Briseno *Factors, in The Death Penalty and Intellectual Disability* 219.

Here, the trial court found Petitioner to have met the three traditional criteria for intellectual disability, finding he had significantly subaverage intellectual functioning with a full-scale IQ of approximately 70, significant deficits in adaptive functioning in the conceptual, social and practical realms, and an age of onset during the developmental period when he failed the first grade twice and every grade thereafter but was "socially promoted." *See* Pet. App. at 39a-40a, 184a. *See also* Petitioner's Brief at 15-17 (describing this evidence in further detail).

Rejecting the trial court's findings, the CCA cited the *Briseno* factors as a basis for denying Petitioner's *Atkins* claim. Pet. App. at 89a-91a (citing anecdotal evidence of *Briseno*-type abilities in planning, rational communications, and lying – all related to the crime and his participation in his defense).

Whatever their source, there can be no doubt that the *Briseno* factors are based on inaccurate and damaging stereotypes. *See* n.6, *supra* (showing overwhelming majority of those with intellectual disability are mildly disabled); n.17, *supra* (noting the stigma associated with the stereotype of *severe* disability discourages identification as intellectually disabled altogether). Unrepresentative, the stereotypes are based on the most severe cases of intellectual disability. It is wrong on several levels to require a defendant seeking exemption from execution under the Eighth and Fourteenth Amendments to live up (or, rather, down) to such a standard.

Briseno "risks executing a person who suffers from intellectual disability." *Hall*, 134 S. Ct. at 2001. It could not be less reliable. *Beck*, 447 U.S. at 638. Applied to foreclose *Atkins* relief in Texas only, Brief for The Constitution Project as *Amicus Curiae*, it could not be more arbitrary. *Gregg*, 428 U.S. at 195. And it is difficult to imagine anything more degrading to a person's dignity than to require him to meet an inaccurate and hurtful stereotype of disability to secure a constitutional protection to save his life. *Hall*, 134 S. Ct. at 2001.

CONCLUSION

The judgment below should be reversed.

Respectfully Submitted,

Brian W. Stull
Counsel of Record
Cassandra Stubbs
Anna Arceneaux
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
201 W. Main Street,
Suite 402
Durham, NC 27701
(919) 682-9469
bstull@aclu.org

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Jeffery P. Robinson
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
810 Third Avenue,
Suite 500
Seattle, WA 98104

Rebecca L. Robertson
AMERICAN CIVIL LIBERTIES
UNION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Dated: August 3, 2016

ECORD
AND
BRIEF

No. 15-797

FILED
AUG - 4 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS TEXAS CHAPTER IN SUPPORT OF PETITIONER

NATHALIE F.P. GILFOYLE
DEANNE OTTAVIANO
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, N.E.
Washington, DC 20002
(202) 336-6100

PAUL M. SMITH
Counsel of Record
J. DOUGLAS WILSON
EMILY A. BRUEMMER
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Counsel for American Psychological Association

Additional Counsel Listed on Inside Cover

AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 326-7921

Counsel for American Psychiatric Association and the American Academy of Psychiatry and the Law

ANNE CAMPER
NATIONAL ASSOCIATION OF
SOCIAL WORKERS
750 First Street, NE
Suite 800
Washington, D.C. 20002
(202) 336-8217

Counsel for National Association of Social Workers and National Association of Social Workers Texas Chapter

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. There Is Unanimous Professional Consensus on the Criteria Applied to Diagnose Intellectual Disability 7

A. The existence of concurrent deficits in intellectual and adaptive functioning is central to the diagnosis of intellectual disability. 8

B. Assessment of deficits in adaptive functioning is necessary to diagnose intellectual disability 9

II. The Use of Outdated or Non-Clinical Criteria to Diagnose Intellectual Disability Violates the Professional Consensus and Clinical Norms of Mental Health Professionals. 14

A. Texas disregards the current diagnostic consensus of mental health professionals when evaluating *Atkins* claims 14

B. Texas fails to properly assess deficits in intellectual deficiencies. 15

C. Texas uses factors to identify intellectual disability that lack any basis in science or medicine and are inconsistent with professional, clinical diagnostic practices..... 16

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 3, 7

Brumfield v. Cain, 135 S. Ct. 2269 (2015) 13

Ex parte Briseño, 135 S.W.3d 1 (Tex. Crim. App. 2004) 6, 12, 17, 19, 21

Hall v. Florida, 134 S. Ct. 1986 (2014) 3, 7, 9, 11, 14, 15

Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005) 20

OTHER AUTHORITIES

Adaptive Behavior Assessment System (Harrison & Oakland, 2015) 12

American Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* (11th ed. 2010) ..... *passim*

American Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* (2013) 25

American Educational Research Ass'n et al., *Standards for Educational and Psychological Testing* (2014) 12, 16

American Psychiatric Ass'n, *Diagnostic and* Statistical *Manual of Mental Disorders* (5th ed. 2013) ..... *passim*

Diagnostic Adaptive Behavior Scale (Tassé et al., in press) 12

Joke J.H. Ellenkamp, et al., *Work Environment-Related Factors in Obtaining and Maintaining Work in a Competitive Employment Setting for Employees with Intellectual Disabilities: A Systematic Review*, 26 J. Occup. Rehab. 56 (2016) 18

David L. Hamilton & A. Neville Uhles, *Stereotypes*, 7 Encyclopedia Psychol. 466 (2000) 17

Kevin S. McGrew, *Intellectual Functioning, in The Death Penalty and Intellectual Disability* 85 (Edward A. Polloway ed., 2015) 15

F. Gerard Moeller et al., *Psychiatric Aspects of Impulsivity*, 158 Am. J. Psychiatry 1783 (Nov. 2001) 21, 22

National Ass'n for the Dually Diagnosed, *Diagnostic Manual -- Intellectual Disability: A Textbook of Diagnosis of Mental Disorders in Persons with Intellectual Disability (DM-ID)* (Robert Fletcher et al. eds., 2007) 20, 23

J. Gregory Olley, *Adaptive Behavior Instruments*, in *The Death Penalty and Intellectual Disability* 187 (Edward A. Polloway ed., 2015) 11, 12, 15

J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities*, in *The Handbook of High-Risk Challenging Behavior: Assessment and Intervention* 229 (J.K. Luiselli ed., 2011) 23, 24, 25-26

Scales of Independent Behavior-Revised (Bruininks, Woodcock, Weatherman, & Hill, 1996) 12

Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114 (2009) 10, 11, 19

Vineland Adaptive Behavior Scales (Sparrow, Cicchetti, & Balla, 2008) 12

Jannelien Weiland *et al.*, *The Prevalence of Personality Disorders in Psychiatric Outpatients with Borderline Intellectual Functioning: Comparison with Outpatients from Regular Mental Health Care and Outpatients with Mild Intellectual Disabilities*, 69 Nordic J. Psychiatry 599 (2015) 19-20

Paul White et al., *Prevalence of Intellectual Disability and Comorbid Mental Illness in an Australian Community Sample*, 39 Austral. & N.Z. J. Psychiatry 395 (2005) 24

Kathryn K. Yamamoto, *et al.*, *Inclusive Postsecondary Education: Reimagining the Transition Trajectories of Vocational Rehabilitation Clients with Intellectual Disabilities*, 40 J. Vocational Rehab. 59 (2014)..... 18

Nurit Yirmiya *et al.*, *The Ability to Manipulate Behavior and to Understand Manipulation of Beliefs: A Comparison of Individuals with Autism, Mental Retardation, and Normal Development*, 32 Developmental Psychol. 62 (1996)..... 25

INTEREST OF *AMICI*[1]

The American Psychological Association is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge; it is the world's largest professional association of psychologists, with 120,000 members. Among the Association's major purposes are to increase and disseminate knowledge regarding human behavior, and to foster the application of psychological learning to important human concerns. The Association's Division of Intellectual and Developmental Disabilities/Autism Spectrum Disorders endeavors to advance the treatment of intellectual and developmental disabilities, based on scientific inquiry and high standards of practice. The Association's Division of Neuropsychology, in collaboration with other national neuropsychology organizations (National Academy of Neuropsychology, American Board of Clinical Neuropsychology and their Academy, and the American Board of Clinical Neuropsychology) works to advance the understanding and treatment of brain conditions affecting intellectual development and disability, based on scientific inquiry and high standards of practice.

The American Psychiatric Association, with more than 36,000 members, is the Nation's leading organization of physicians who specialize in psychiatry. Its member physicians work to ensure humane care and

---

[1] This brief was written by counsel for amici, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

effective treatment for all persons with mental disorders, including intellectual disability. Association members engage in psychiatric treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. The American Psychiatric Association and its members have substantial knowledge and experience relevant to the issues in this case. In 2013, the American Psychiatric Association published the Fifth Edition of its Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"). DSM-5 provides a revised definition for intellectual disability (intellectual developmental disorder) based on expert consensus, review of the scientific literature, and contributions from other professional societies.

American Academy of Psychiatry and the Law, with approximately 2,000 psychiatrist members dedicated to excellence in practice, teaching, and research in forensic psychiatry, has participated as an *amicus curiae* in, among other cases, *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014); *Brown v. Plata*, 563 U.S. 493 (2011); *Indiana v. Edwards*, 554 U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnson*, 532 U.S. 782 (2001).

The National Association of Social Workers ("NASW") is a professional membership organization with 130,000 social workers in chapters in every State, the District of Columbia, and internationally. The NASW Texas Chapter has approximately 5,600 members. Since 1955, NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes

professional studies and books, provides continuing education and enforces the *NASW Code of Ethics*.

* * *

The issue at the heart of this case—the identification of individuals with intellectual disability—has been the subject of significant research by psychologists, psychiatrists, and other mental health professionals. Amici submit this brief to present relevant scientific knowledge that can provide context for the Court's review of whether Texas's system for identifying individuals with intellectual disability in capital cases violates the Eighth Amendment and this Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014).

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, this Court held that the Eighth Amendment prohibits the execution of individuals with intellectual disability. 536 U.S. 304, 321 (2002). This Court's decision was grounded in the recognition that individuals with intellectual disability (then referred to as mental retardation) have impairments of intellectual and adaptive functioning that make them less morally culpable and place them at a heightened risk of wrongful execution. *Id.* at 318, 320–21. *Atkins* relied on the clinical definitions promulgated by mental health professionals to identify intellectual disability. *Id.* at 308 n.3, 318.

Hall v. Florida, decided two years ago, reiterated the constitutional prohibition on the execution of individuals with intellectual disability. 134 S. Ct. 1986, 1990 (2014). In doing so, this Court held that Florida's

rule that an individual who scores above 70 on an IQ test—including a score within the margin for measurement error—is barred from presenting other evidence of intellectual disability "create[d] an unacceptable risk that persons with intellectual disability will be executed, and this is unconstitutional." *Id.* Florida's rule was unconstitutional because its definition of intellectual disability was inconsistent with the clinical standards of diagnosis adopted by the mental health professions. *See id.* at 1993 ("In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.").

In assessing whether an individual meets the clinical definition of intellectual disability, there is a unanimous consensus among the mental health professions that accurate diagnosis requires clinical judgment based on a comprehensive assessment of three criteria: general intellectual functioning, adaptive functioning, and onset during the developmental period. A state's failure to follow the appropriate diagnostic approach violates applicable professional standards and creates an unacceptable and significant risk that individuals with intellectual disability may be executed in violation of the Eighth Amendment and this Court's decisions in *Atkins* and *Hall*.

The Texas Court of Criminal Appeals in *Ex Parte Moore* failed to apply the consensus criteria for diagnosing intellectual disability. *Ex Parte Moore*, 470 S.W.3d 481, 486-87 (Tex. Crim. App. 2015), *cert. granted*

in part, 136 S. Ct. 2407 (2016).[2] Texas fails to abide by the clinical definition of intellectual disability in three ways.

First, the Texas Court of Criminal Appeals fails to follow current clinical standards by relying on an outdated 1992 diagnostic manual rather than applicable contemporary manuals. App. at 5a. As the scientific and medical knowledge in the area of mental health have evolved and advanced, so have the diagnostic standards adopted and utilized by the mental health professions. Texas's refusal to recognize these diagnostic advances is incompatible with this Court's Eighth Amendment jurisprudence.

Second, the Texas Court of Criminal Appeals fails to follow the appropriate diagnostic standards regarding IQ test scores that were at issue in this Court's decision in *Hall*. The court in *Ex Parte Moore* recognized that Moore had an IQ score between 69 and 79 after applying the appropriate standard error of measurement. App. at 74a–75a. The lower range of this score, approximately two standard deviations below the mean, is sufficient—after the application of clinical judgment—to diagnose significant limitations in intellectual functioning. Yet the *Ex Parte Moore* court instead found that this score represented intellectual functioning "above the intellectually disabled range." *Id.* at 75a. This conclusion has no clinical basis and is in conflict with consensus diagnostic practices.

---

[2] The decision of the Court of Criminal Appeals is reprinted in Petitioner's Appendix to the Petition for Certiorari ("App.") at App. 1a–126a.

Third, Texas continues to rely on additional, non-clinical "factors" to determine whether an individual is intellectually disabled for purposes of the Eighth Amendment beyond the diagnostic criteria used by mental health professionals. These factors, first articulated in *Ex parte Briseño*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004), are unsupported by any scientific or medical evidence and inconsistent with the professional standards used by mental health professionals to diagnose intellectual disability. Instead, the so-called *Briseño* factors are an invention of the Texas Court of Criminal Appeals based on (1) unwarranted lay stereotypes of persons with intellectual disability; (2) the mistaken notion that the presence of some adaptive strengths signals a lack of intellectual disability; (3) an unwarranted emphasis on atypical behavior; and (4) a mistaken understanding of the relationship between intellectual disability and mental disorders. Simply put, the presence or absence of the various factors identified in *Briseño* is not a reliable indication of intellectual disability.

Each of these divergences from the professional consensus of the mental health professions on the diagnosis of intellectual disability creates an extraordinary risk that persons with intellectual disability will be executed in violation of the Eighth Amendment.

ARGUMENT

I. There Is Unanimous Professional Consensus on the Criteria Applied to Diagnose Intellectual Disability.

As this Court has recognized, there is a consensus among mental health professionals on the criteria to diagnose intellectual disability. *Hall*, 134 S. Ct. at 1993–94; *Atkins*, 536 U.S. at 308 n.3. The accepted clinical definitions of intellectual disability include three criteria: (1) significant limitations in general intellectual functioning; (2) significant limitations in adaptive functioning; and (3) onset during the developmental period. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) ("DSM-5"); Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 27 (11th ed. 2010) ("AAIDD Manual").[3] The Court has cited and relied on the definitions of intellectual disability from the American Psychiatric Association and the American Association on Intellectual and Development Disabilities ("AAIDD") in its decisions. *See Hall*, 134 S. Ct. at 1990 (citing the DSM-5); *Atkins*, 536 U.S. at 308 n.3 (citing earlier versions of the AAIDD Manual and the DSM).

---

[3] The AAIDD Manual and DSM-5 definitions of intellectual disability differ in some particulars not relevant for the purposes of this brief or the question presented to the Court in this case.

A. The existence of concurrent deficits in intellectual and adaptive functioning is central to the diagnosis of intellectual disability.

In order to accurately diagnose intellectual disability, a mental health professional must make a comprehensive assessment of a person's intellectual and adaptive functioning.[4] A comprehensive assessment must be "based on multiple data points" that "include giving equal consideration to significant limitations in adaptive behavior and intellectual functioning." AAIDD Manual at 28. Adaptive skills—such as abstract thinking, social judgment, regulating emotion, and resisting manipulation by others—are crucial to an individual's ability to live independently and function within the boundaries of social norms. *See* DSM-5 at 33–34; AAIDD Manual at 44-45. And the assessment of adaptive functioning is necessary to arrive at a valid diagnosis of intellectual disability. DSM-5 at 37-38; AAIDD Manual at 44-46.

The criteria to diagnose intellectual disability are not evaluated separately, in disjunctive inquiries, but are rather considered together during a clinical evaluation by a mental health professional. *See* DSM-5 at 37 ("The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions."); AAIDD Manual at 29 ("[c]linical judgment is essential"). Contrary to the Texas Court of Criminal Appeal's decision in *Ex Parte*

---

[4] The third criterion, onset during the developmental period, requires that the deficits be present before the person reaches adulthood. DSM-5 at 33; AAIDD Manual at 6.

Moore, the requirement that the deficits in adaptive behavior must be "related" to the impairments in intellectual functioning does not alter the normal assessment. *See* App. at 6a & n.4 (citing DSM-IV at 46). The current diagnostic criteria require a connection between the deficits in intellectual functioning and adaptive functioning, but that connection need only exclude the obvious limits to adaptive functioning imposed by other ailments. The most obvious of those include physical disabilities that impair sensory abilities (*e.g.*, blindness or deafness). Whether a deficit in adaptive functioning is "related" to intellectual impairments is a clinical judgment and cannot be reduced to a layperson's "just so" stories. The notion that a court could determine that deficits in adaptive and intellectual functioning were *unrelated* based on the non-clinical, so-called *Briseño* factors is unsupported by scientific or medical research.

In *Hall*, this Court addressed in depth the first element of intellectual disability: significantly sub-average intellectual functioning. *Hall*, 134 S. Ct. at 1994–96. In particular, *Hall* emphasized that an IQ score derived from a test cannot alone be considered "final and conclusive evidence of a defendant's intellectual capacity" and that such scores must be interpreted properly, which requires, *inter alia*, appreciation of a score's standard error of measurement or "SEM." *Id.* at 1995.

B. Assessment of deficits in adaptive functioning is necessary to diagnose intellectual disability.

Adaptive functioning, the second element of intellectual disability, is the "collection of conceptual,

social, and practical skills that have been learned and are performed by people in their everyday lives." AAIDD Manual at 45. "Deficits in adaptive functioning . . . refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5 at 37. Adaptive functioning involves adaptive reasoning in three domains—conceptual, social, and practical—which are grounded in substantial empirical studies. AAIDD Manual at 44; *see also* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114 (2009) (hereinafter "*Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*").[5] Representative skills in the three domains include:

- *Conceptual skills* that include language, reading and writing, and mathematical reasoning;
- *Social skills* that include interpersonal skills, empathy, and social judgment and problem solving; and
- *Practical skills* that include personal care, occupational skills, schedules, and task organization.

See AAIDD Manual at 44; DSM-5 at 37.

---

[5] The preferred clinical term is now "intellectual disability," rather than "mental retardation," which was the term used by the *Atkins* court. *See* AAIDD Manual at 3.

Adaptive functioning is assessed using clinical evaluation in combination with systematic review of existing records and pertinent standardized tests. AAIDD Manual at 47; DSM-5 at 37. Evaluating adaptive functioning requires collecting records and information regarding an individual's functioning over time and in disparate settings.[6] As this Court has acknowledged, the mental health community accepts, as potentially "probative of intellectual disability," a variety of "substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Hall*, 134 S. Ct. at 1994. Mental health professionals have developed standardized measures to evaluate adaptive functioning. *See generally* J. Gregory Olley, *Adaptive Behavior Instruments*, in *The Death Penalty and Intellectual Disability* 187–98 (Edward A. Polloway ed., 2015) (hereinafter "*Adaptive Behavior Instruments*"); *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases* at 117–18.

The clinical assessment of deficits in adaptive functioning uses standardized measures. AAIDD Manual at 47; DSM-5 at 37. Contrary to the opinion of

---

[6] *See Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases* at 119 ("The ideal respondents are individuals who have the most knowledge of the individual's everyday functioning across settings . . . .").

the Texas Court of Criminal Appeals, the clinical diagnosis of deficits in adaptive functioning is not "exceedingly subjective." *Ex parte Briseño*, 135 S.W.3d at 8. Indeed, the development and refinement of standardized instruments to measure adaptive behavior has greatly improved the diagnosis of intellectual disability. *See* Adaptive Behavior Instruments at 187–88. There are currently three contemporary scales used to diagnose limitations in adaptive behavior along with a forthcoming instrument.[7] Each of these instruments meets "contemporary standards for standardization, reliability, and validity." *Id.* at 189.[8] It is simply incorrect to assert—especially without reference to authority—that the assessment of adaptive functioning

---

[7] The three contemporary scales are the Scales of Independent Behavior-Revised (Bruininks, Woodcock, Weatherman, & Hill, 1996); the Adaptive Behavior Assessment System (Harrison & Oakland, 2015); and the Vineland Adaptive Behavior Scales (Sparrow, Cicchetti, & Balla, 2008). The forthcoming instrument is the Diagnostic Adaptive Behavior Scale (Tassé et al., in press).

[8] Assessment of adaptive behaviors requires the use of current testing instruments. Am. Educ. Research Ass'n et al., *Standards for Educational and Psychological Testing* 93 (2014) (hereinafter "*Standards for Educational and Psychological Testing*") ("If an older version of a test is used when a newer version has been published or made available, test users are responsible for providing evidence that the older version is as appropriate as the new version for that particular test use.").

is subjective when done according to the accepted clinical standards.

A person must have a significant limitation in adaptive behavior in one of the three skill domains. AAIDD Manual at 47 (defining "significant" as two standard deviations below the population average); DSM-5 at 37–38 (noting that one or more domains of adaptive functioning must be "sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community").

Importantly, mental health professionals agree that intellectual disability can and should be diagnosed where there are sufficient *deficits* in adaptive functioning. That remains true even if the individual has relative strengths in other areas. The presence of relative strengths in some spheres of behavior is *not* evidence that a person does *not* have intellectual disability. AAIDD Manual at 45 ("adaptive skill limitations often coexist with strengths"); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation'" (quoting the 2002 AAMR Manual)).

II. The Use of Outdated or Non-Clinical Criteria to Diagnose Intellectual Disability Violates the Professional Consensus and Clinical Norms of Mental Health Professionals.

In *Hall*, the Court faced Florida's "disregard [of] established medical practice" with regard to the intellectual functioning element of intellectual disability. *Hall*, 134 S. Ct. at 1995. Here, Petitioner presents the Court with a state that ignores established professional consensus regarding (1) the use of current diagnostic criteria; (2) the failure to apply the appropriate clinical standards when assessing deficits in intellectual functioning; and (3) the failure to apply the appropriate clinical standards when assessing deficits in adaptive functioning, including relying on non-clinical factors created out of whole cloth by the Texas Court of Criminal Appeals.

A. Texas disregards the current diagnostic consensus of mental health professionals when evaluating *Atkins* claims.

The criteria used to diagnose intellectual disability have evolved over time. AAIDD Manual at xiv; DSM-5 at 5. Changes from previous diagnostic manuals are grounded in the advancement of scientific and medical knowledge. DSM-5 at 6–7; AAIDD Manual at xiv–xvi. The refinement of the diagnostic criteria of intellectual disability is evidence of the scientific method at work. As mental health professionals learn more about intellectual disability, the ability of clinicians to diagnose intellectual ability is improved. Further, the instruments necessary for the objective diagnosis of intellectual disability also continue to improve. *See*

Kevin S. McGrew, *Intellectual Functioning*, in *The Death Penalty and Intellectual Disability* 85, 87-89 (Edward A. Polloway ed., 2015); *Adaptive Behavior Instruments* at 187–90.

Notwithstanding the advances in understanding and diagnosing intellectual disability, Texas continues to rely on an outdated diagnostic manual from 1992. *See* App. at 6a. This reliance is not justified by scientific or medical practice and risks the misdiagnosis of persons with intellectual disability.

B. Texas fails to properly assess deficits in intellectual deficiencies.

Hall recognized that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning." 134 S. Ct. at 2000. Thus, the proper assessment of intellectual functioning requires clinical judgment beyond a simplistic determination that IQ scores above a certain measure conclusively determine that a person does not have intellectual disability. *Id.* ("It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." (citing DSM-5 at 37)).

The court in *Ex Parte Moore* excluded a number of IQ test scores, relying on two of the higher scores to conclude that Moore does not have sufficient deficits in intellectual functioning to be diagnosed with intellectual disability. App. at 69a–75a. Setting aside the court's decision to exclude five of the seven IQ test scores,[9] the

---

[9] *Amici* do not address whether the Texas Court of Criminal Appeals erred in disregarding any particular test. Instead,

Texas's court's failure to recognize that one of the two remaining IQ test scores was within the range of deficits necessary to diagnose intellectual disability—given SEM—is inconsistent with and contrary to the consensus diagnostic practices. *See* AAIDD Manual at 35–36 (describing appropriate use of SEM). A score of 74—as Moore received—on an accepted IQ test is sufficient, with further clinical judgment, to justify a diagnosis of intellectual disability.

C. Texas uses factors to identify intellectual disability that lack any basis in science or medicine and are inconsistent with professional, clinical diagnostic practices.

Texas's reliance on the so-called *Briseño* factors to diagnose intellectual disability is incompatible with the diagnostic consensus of mental health professionals. Instead of providing reliable indicia of deficits in adaptive functioning, *see supra* I.B, the factors Texas allows factfinders to use to determine eligibility for relief under *Atkins* distort the assessment of adaptive functioning by (1) relying on stereotypes of intellectual

---

Amici emphasize that while there are well-established clinical reasons to disregard a particular IQ score from an assessment of intellectual disability, such a decision must be grounded in clinical judgment. *See Standards for Educational and Psychological Testing* 7 ("[E]valuating acceptability [of a test] depends on [factors including] professional judgment that is based on a knowledge of behavioral science, psychometrics, and the relevant standards in the professional field to which the test applies"); DSM-5 at 37 ("Clinical training and judgment are required to interpret test results and assess intellectual performance.").

disability; (2) focusing on strengths rather than deficits; (3) emphasizing atypical behavior; and (4) excluding a diagnosis of intellectual disability when other mental disorders are present.

After this Court's decision in *Atkins*, the Texas Court of Criminal Appeals adopted non-clinical factors to be used to determine whether individuals were intellectually disabled. *Ex parte Briseño*, 135 S.W.3d at 8–9. The court in *Briseño* cited no mental health or medical authority as the basis for these factors, instead alluding to a fictional character in John Steinbeck's 1937 novel *Of Mice and Men* as the basis for its reasoning about intellectual disability diagnosis. *Id.*

The *Briseño* factors have four substantial flaws that make them unsuitable to diagnose intellectual disability.

Lay stereotypes of intellectual disability. The factors indulge lay opinions and stereotypes about those who are intellectually disabled. The *Briseño* factors are more consistent with stereotypes of the intellectually disabled rather than clinical standards used by mental health professionals to diagnose intellectual disability. *See* "Choice and Control" (studying how persons with intellectual disability exercised forms of autonomy with the assistance of social workers). Texas's reliance on stereotypes rather than the accepted clinical criteria for diagnosing intellectual disability risks misdiagnosing individuals due to mistaken assumptions about persons with intellectual disability. *See* David L. Hamilton & A. Neville Uhles, *Stereotypes*, 7 Encyclopedia of Psychol. 466, 466–70 (2000) (identifying the consequences of

stereotyping as increased confirmation bias, in-group discrimination, and self-fulfilling prophecy).

Inappropriate emphasis on individual strengths or competences. Persons who have intellectual disability are not typically incompetent across all domains. "Individuals with an [intellectual disability] typically demonstrate both strengths and limitations in adaptive behavior." AAIDD Manual at 47. Yet the *Briseño* decision assumes that any demonstration of relative competence disqualifies one from having intellectual disability. This is not correct. Intellectually disabled persons can exhibit relative strengths. *See, e.g.*, Kathryn K. Yamamoto, *et al.*, *Inclusive Postsecondary Education: Reimagining the Transition Trajectories of Vocational Rehabilitation Clients with Intellectual Disabilities*, 40 J. Vocational Rehab. 59, 60, 64 (2014) (identifying post-secondary opportunities for persons with intellectual disability); Joke J.H. Ellenkamp, *Work Environment-Related Factors in Obtaining and Maintaining Work in a Competitive Employment Setting for Employees with Intellectual Disabilities: A Systematic Review*, 26 J. Occup. Rehab. 56, 57 (2016) (citing estimates that between 9 and 40 percent of persons with intellectual disability have some form of paid employment). Thus, the reality of mixed competencies can conflict with stereotypes of persons with intellectual disability that portray these individuals as comprehensively deficient. One scholar has explained the very risk created by *Briseño*:

> These strengths may confound a layperson or a professional with limited clinical experience with individuals who have mild

> [intellectual disability]. These laypersons may erroneously interpret these pockets of strengths and skills as inconsistent with [intellectual disability] because of their misconceptions regarding what someone with [intellectual disability] can or cannot do.

Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases at 121.

Focus on the atypical. The diagnosis of deficits in adaptive functioning requires a focus "on the individual's typical performance and not their best or assumed ability or maximum performance." AAIDD Manual at 47 (noting the contrast between adaptive functioning—which focuses on the typical—and intellectual functioning with its assessment of maximum performance); *see also* DSM-5 at 33.

Exclusion of personality disorders. *Ex parte Briseño* appears to treat intellectual disability as inconsistent with personality disorders. 135 S.W.3d at 8–9. But, to the contrary, persons with intellectual disability are three to four times more likely to have co-occurring mental disorders—with personality disorders being one type of many such disorders—than the general population. DSM-5 at 40. The existence of a personality disorder or other mental health issue is emphatically not evidence that a person does not also have intellectual disability. *See* Jannelien Weiland, *et al., The Prevalence of Personality Disorders in Psychiatric Outpatients with Borderline Intellectual Functioning: Comparison with Outpatients from Regular Mental Health Care and Outpatients with Mild*

Intellectual Disabilities, 69 Nordic J. Psychiatry 599, 602 (2015) ("[T]here is growing evidence that low IQ is associated with increased risk of and severity of mental disorders, including [personality disorders]...."); National Ass'n for the Dually Diagnosed, *Diagnostic Manual – Intellectual Disability: A Textbook of Diagnosis of Mental Disorders in Persons with Intellectual Disability (DM-ID)* 248–49 (Robert Fletcher et al. eds., 2007) (2007) (hereinafter "*Diagnostic Manual – Intellectual Disability*"); *see also Lambert v. State*, 126 P.3d 646, 655 (Okla. Crim. App. 2005) (once adaptive functioning deficits were conceded, evidence that mental illness may have played a causal role was irrelevant and inadmissible). Clinical practice does not require this creation of a "false dichotomy" between mental illness and intellectual disability, which mental health professionals recognize may coexist or may even be interrelated. *See* DSM-5 at 38–40 (stating that the course of intellectual disability "may be influenced by underlying medical or genetic conditions and co-occurring conditions" and that "[c]o-occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability").

* * *

Not one of the Briseño factors is a sufficient or necessary element of the clinical definition of intellectual disability. The seven factors invented by the Texas Court of Criminal Appeals cannot reliably or accurately be used to identify intellectual disability. The flaws of

each factor, *Ex parte Briseño*, 135 S.W.3d at 8–9, are described below:

1. *Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?*

While mental health professionals interview individuals who knew the subject when assessing adaptive functioning, a layperson's *recognition* of intellectual disability is neither sufficient nor necessary. Indeed, families may avoid making statements that would associate an individual or the individual's family with the stigma associated with the label of intellectual disability. Family members or community members may lack objectivity and will likely possess varying levels of awareness regarding intellectual disability and its indicators. The absence of a layperson's opinion that an individual has intellectual disability is *not* reliable evidence that the person does not have intellectual disability. This is why clinical interviews of family members ask about the individual's typical behavior but do not ask family members to make a diagnosis. To do otherwise is to substitute a layperson's untrained opinion for that of a mental health professional.

2. *Has the person formulated plans and carried them through or is his conduct impulsive?*

Impulsivity is a feature of personality and not intellectual disability. F. Gerard Moeller *et al.*, *Psychiatric Aspects of Impulsivity*, 158 Am. J. Psychiatry 1783 (Nov. 2001) (hereinafter "*Psychiatric*

Aspects of Impulsivity"). The fact that some persons with intellectual disability behave impulsively does not make it evidence of intellectual disability. AAIDD Manual at 47. Nor is the ability to formulate plans and carry them out the opposite of impulsivity. *See Psychiatric Aspects of Impulsivity* at 1784. Even persons who are impulsive may formulate and carry out plans. Impulsivity is not part of the clinical definition of intellectual disability. AAIDD Manual at 27–29; DSM-5 at 33. Nor would a single example of formulating and carrying out a plan exclude a diagnosis of intellectual disability. While difficulty planning is relevant to the diagnosis of intellectual disability, *see* DSM-5 at 33, it is only one of multiple potential indicators.

3. *Does his conduct show leadership or does it show that he is led around by others?*

While substantial gullibility or naïveté can be evidence of deficits in social adaptive behavior, AAIDD Manual at 44; DSM-5 at 34, 38, examples of leadership do not demonstrate that a person does not have intellectual disability. As discussed above, adaptive strengths or instances in which an individual shows leadership do not negate the adaptive deficits which indicate intellectual disability.

4. *Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?*

The concepts of "rational" and "appropriate" are situation-specific. Contexts and typical behavior matter a great deal, and anecdotal evidence of "rational" or "appropriate" behavior in any given context cannot

demonstrate that one does or does not have intellectual disability. Further, and perhaps more central to the problem with this factor is that placing emphasis on "rationality" evidences a common confusion between mental illness and intellectual disability. Irrational thinking is characteristic of mental illness. *Diagnostic Manual – Intellectual Disability.* People with intellectual disability experience significant difficulties with learning and judgment, but there is nothing in any definition of intellectual disability to indicate that irrational thinking is diagnostic.

5. *Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?*

Expressive and receptive language and communication skills are certainly relevant to the diagnosis of intellectual disability. AAIDD Manual at 44 (noting that language as well as reading and writing are conceptual skills); DSM-5 at 37 (same). However, lay interpretations of isolated or limited communications are insufficient to diagnose a deficiency in an individual's adaptive functioning outside of a comprehensive clinical assessment. J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities, in The Handbook of High-Risk Challenging Behavior: Assessment and Intervention* 229, 236–37 (J.K. Luiselli ed., 2011) (hereinafter "*The Death Penalty, the Courts, and Intellectual Disabilities*"). And, as noted above, irrationality is not an element used to diagnose intellectual disability. *See supra* at 22. Similarly, lack of coherence is a symptom that is more associated with mental disorders, like psychosis, rather than a symptom

of intellectual disability. *See* Paul White et al., *Prevalence of Intellectual Disability and Comorbid Mental Illness in an Australian Community Sample*, 39 Austral. & N.Z. J. Psychiatry 395–400 (May 2006).

This factor is particularly irrelevant for persons who have mild intellectual disability. Persons with mild intellectual disability may marry, have jobs, and participate meaningfully in society with adequate support. AAIDD Manual at 151–66; DSM-5 at 34–36. Laypersons, including courts, may misunderstand mild intellectual disability by assuming that individuals with intellectual disability will be easy to identify based on physical appearance or speech. *See The Death Penalty, the Courts, and Intellectual Disabilities* at 231. Reliance on stereotypes ignores the reality that "mild ID typically presents no obvious physical signs and . . . such individuals have many areas of competence to accompany areas of impairment." *Id.* Texas's non-clinical standard, holding that any person who can communicate rationally and coherently does not have intellectual disability, ignores the reality that individuals with intellectual disability have varied abilities and experiences. It effectively eliminates a significant portion of persons who have intellectual disability.

6. *Can the person hide facts or lie effectively in his own or others' interests?*

The ability to deceive has no relevance to the accepted clinical criteria for diagnosing intellectual disability. Indeed, there is little research on whether ability to deceive has a relationship to intellectual disability. However, the available literature does

suggest that persons with intellectual disability are able "to act deceptively in order to manipulate the behavior of others." Nurit Yirmiya *et al.*, *The Ability to Manipulate Behavior and to Understand Manipulation of Beliefs: A Comparison of Individuals with Autism, Mental Retardation, and Normal Development*, 32 Developmental Psychol. 62, 66 (1996). Since lying is a nearly universal behavior beginning in early childhood, *id.* at 62, this factor could exclude any person from being diagnosed with intellectual disability. Furthermore, it would be difficult to effectively evaluate this factor in a clinical setting because there is no clinical standard for assessing the ability to deceive.

7. *Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?*

There is no standard for what constitutes sufficient evidence of planning to demonstrate a lack of intellectual disability. Intellectual disability is not diagnosed by focusing on abilities or strengths, but instead by identifying deficits in adaptive functioning. The focus on the crime—one event—may come at the expense of other, more typical life events that provide a more accurate assessment of an individual's adaptive functioning. *See* Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* 396 (Sept. 2013). It is a mistake for courts to accept one example of competent functioning when the assessment of adaptive deficits relates to an individual's deficits and weaknesses, not an individual's strengths. *See The*

Death Penalty, the Courts, and Intellectual Disabilities at 236.

CONCLUSION

There is a consensus among the mental health professions about how properly to diagnose persons with intellectual disability. Texas's approach to intellectual disability is inconsistent with this consensus. The mental health professions rely on contemporary diagnostic criteria that use the most accurate and reliable standards and instruments to diagnose intellectual disability. Consistent with this Court's decision in *Hall*, mental health professionals interpret IQ scores using appropriate clinical judgment, including the acceptance of the standard error of measurement. Finally, the so-called *Briseño* factors are incompatible with the consensus among the mental health professions and, when used, provide inaccurate and unreliable diagnoses of intellectual disability. The use of antiquated diagnostic criteria, refusal to interpret IQ scores using clinical standards, and the inclusion of non-clinical factors to diagnose intellectual disability all create significant risks that individuals with intellectual disability will be executed in violation of the Eighth Amendment. Instead, the appropriate method of diagnosis in every case is a comprehensive assessment of the individual's adaptive and general intellectual functioning using the mental health professions' clinical standards.

For the foregoing reasons, the diagnosis of intellectual disability in capital cases should be based on the diagnostic consensus of mental health professionals, which requires the comprehensive assessment of

intellectual and adaptive functioning using contemporary standards.

Respectfully submitted,

NATHALIE F.P. GILFOYLE
DEANNE OTTAVIANO
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, N.E.
Washington, DC 20002
(202) 336-6100

PAUL M. SMITH
Counsel of Record
J. DOUGLAS WILSON
EMILY A. BRUEMMER
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Counsel for American Psychological Association

AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036
(202) 326-7921

Counsel for American Psychiatric Association and the American Academy of Psychiatry and the Law

ANNE CAMPER
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First Street, NE
Suite 800
Washington, D.C. 20002
(202) 336-8217

Counsel for National Association of Social Workers and National Association of Social Workers Texas Chapter

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A State Intellectual Disability Definitions ..... App. 1

Appendix B State Adaptive Functioning/Behavior Standards ..... App. 8

Appendix C AAIDD and APA Intellectual Disability Definitions ..... App. 13

APPENDIX A

State Intellectual Disability Definitions	
AL	Applies clinical standards considered in *Atkins*: "[T]he *Atkins* Court discussed clinical definitions of mental retardation and concluded that these definitions require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Lane v. State*, 169 So. 3d 1076, 1088–89 (Ala. Crim. App. 2013) (quotation omitted).
AZ	A condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen. A.R.S. § 13-753(K).
AR	Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and a deficit in adaptive behavior. ARK. CODE § 5-4-618(a)(1).
CA	"[T]he condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." *In re Hawthorne*, 105 P.3d 552, 554 (Cal. 2005).

CO	Any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist. COLO. REV. STAT. § 18-1.3-1101(2).
FL	Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. FLA. STAT. § 921.137(1).
GA	Having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period. GA. CODE § 17-7-131(a)(3).
ID	Significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years. IDAHO CODE § 19-2515A(1).

IN	An individual who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior. IND. CODE §§ 35-36-9-2, 35-36-9-3(c).
KS	Having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01, and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law. KAN. STAT. §§ 21-6622.
KY	Significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period KY. REV. STAT. § 532.130(2).
LA	A disability characterized by all of the following deficits, the onset of which must occur during the developmental period: (a) Deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing. (b) Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility; and that, without ongoing support, limit functioning in one or more activities of daily life including, without limitation,

	communication, social participation, and independent living, across multiple environments such as home, school, work, and community. LA. CODE CRIM. P. ART. 905.5.1.
MS	Adopting AAIDD 11th and DSM-5 definitions of intellectual disability. *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015).
MO	A condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age. MO. REV. STAT. § 565.030(6).
MT	No definition.
NV	Significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period. NEV. REV. STAT. § 174.098(7).
NH	No definition.[1]

[1] This chart does not include intellectual disability statutes enacted for another purpose that have not been adopted for or applied to *Atkins* claims.

NC	A condition marked by significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18. N.C. GEN. STAT. § 15A-2005(a)(1)(a).
OH	Significantly subaverage intellectual functioning, significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and onset before the age of 18. *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (citing *Atkins*, AAMR 10th, and DSM-IV-TR).
OK	Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, which manifested before age 18. OKLA. STAT. TIT. 21, § 701.10b(A)(1), (B).
OR	Adopting DSM-5 criteria. *State v. Agee*, 364 P.3d 971, 989–90 (Or. 2015).
PA	Significantly subaverage intellectual functioning, significant adaptive deficits, and onset before age 18. *Commonwealth v. Bracey*, 117 A.3d 270, 274 (Pa. 2015).
SC	Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. S.C. CODE § 16-3-20(C)(b)(10).

SD	Significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. S.D. CODIFIED LAWS § 23A-27A-26.2.
TN	Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age. TENN. CODE § 39-13-203(a).
TX	Significantly subaverage general intellectual functioning; accompanied by related limitations in adaptive functioning; the onset of which occurs prior to the age of 18. *Ex parte Briseño*, 135 S.W.3d 1, 7–8 (Tex. Crim. App. 2004) (citing AAMR 9th and Tex. Health & Safety Code § 591.003(7-a)).
UT	Significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas, both of which are manifested before age 22. UTAH CODE § 77-15a-102.

VA	A disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills. VA. CODE § 19.2-264.3:1.1(A).
WA	Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period. WASH. REV. CODE § 10.95.030(2)(a).
WY	Significantly subaverage general intellectual functioning with concurrent deficits in adaptive behavior manifested during the developmental period. WYO. STAT. § 8-1-102(a)(xiii).

APPENDIX B

State Adaptive Functioning/ Behavior Standards	
AL	"[S]ignificant limitations in adaptive skills such as communication, self-care, and self-direction." *Lane v. State*, 169 So. 3d 1076, 1088–89 (Ala. Crim. App. 2013).
AZ	The effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group. A.R.S. § 13-753(K)(1).
AR	More than one significant adaptive limitation in the DSM-IV-TR adaptive skill areas. *Sasser v. Hobbs*, 735 F.3d 833, 848 (8th Cir. 2013).
CA	Applies AAMR 9th and/or DSM-IV-TR definition. *In re Hawthorne*, 105 P.3d 552, 556–57 (Cal. 2005).
CO	No definition.
FL	The effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. *Id.* To be diagnosed as mentally retarded, a defendant must show significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, and work. *Hodges v. State*, 55 So.3d 515, 534 (Fla. 2010) (citing *Atkins*).

GA	No definition.
ID	Significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. IDAHO CODE § 19-2515A(1).
IN	Declining to adopt DSM-IV-TR and AAMR 10th standards but characterizing them as a "safe harbor." *Pruitt v. State*, 834 N.E.2d 90, 109–10 (Ind. 2005).
KS	No showing of impaired adaptive behavior required. See *State v. Maestas*, 316 P.3d 724, 736–37 (Kan. 2014).
KY	Quoting *Atkins'* references to AAMR 9th ed. and DSM-IV-TR definitions. *Bowling v. Commonwealth*, 163 S.W.3d 361, 367–68 (Ky. 2005).
LA	Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility; and that, without ongoing support, limit functioning in one or more activities of daily life including, without limitation, communication, social participation, and independent living, across multiple environments such as home, school, work, and community. LA. CODE CRIM. P. ART. 905.5.1.
MS	Adopting AAIDD 11th and DSM-5 definitions of intellectual disability. *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015).

MO	Related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. MO. REV. STAT. § 565.030(6).
MT	No definition.
NV	Referring to AAMR 10th and DSM-IV-TR as "useful guidance in applying" the statutory definition. *Ybarra v. State*, 247 P.3d 269, 274 (Nev. 2011).
NH	No definition.
NC	Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills. N.C. GEN. STAT. § 15A-2005(a)(1)(b). Accepted clinical standards for diagnosing significant limitations in intellectual functioning and adaptive behavior shall be applied in the determination of intellectual disability. *Id.* § 15A-2005(a)(2).
OH	Significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction. *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002).

OK	Significant limitations in two or more of the following adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills. OKLA. STAT. TIT. 21, § 701.10b(A)(2).
OR	Adopting DSM-5 criteria. *State v. Agee*, 364 P.3d 971, 989–90 (Or. 2015).
PA	Citing AAIDD 11th and DSM-IV-TR definitions. *Commonwealth v. Bracey*, 117 A.3d 270, 274 (Pa. 2015).
SC	No definition.
SD	No definition.
TN	"Significant limitations in at least two of the following basic skills: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *State v. Pruitt*, 415 S.W.3d 180, 204 (Tenn. 2013) (quotation omitted).
TX	Citing with approval AAMR 9th edition definition. *Ex parte Briseno*, 135 S.W.3d 1, 7–8 (Tex. Crim. App. 2004).
UT	Deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas. UTAH CODE § 77-15a-102.
VA	Significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills. VA. CODE § 19.2-264.3:1.1(A).

WA	The effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age. WASH. REV. CODE § 10.95.030(2)(d).
WY	No definition.

APPENDIX C

AAIDD and APA Intellectual Disability Definitions	
AAMD 8th ed.	Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.[1]
AAMR 9th ed.	Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in . . . adaptive skill areas . . . . Mental retardation manifests before age 18.[2]
AAMR 10th ed.	Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.[3]

---

[1] American Association on Mental Deficiency, *Classification in Mental Retardation* 11 (8th ed. 1983).

[2] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992).

[3] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 39 (10th ed. 2002).

AAIDD 11th ed.	Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before are 18.[4]
DSM-III-R	The essential features of this disorder are: (1) significantly subaverage general intellectual functioning, accompanied by (2) significant deficits or impairments in adaptive functioning, with (3) onset before the age of 18.[5]
DSM-IV-TR	The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning ... (Criterion B). The onset must occur before age 18 years (Criterion C).[6]

[4] American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 5 (11th ed. 2010).

[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 28 (3d ed. revised 1987).

[6] American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. text revision 2000).

DSM-5	Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.[7]

[7] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013). Although the DSM-5, unlike the DSM-IV-TR, no longer includes a particular IQ score in its diagnostic criteria, it states: "Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points." *Id.* at 37.

AAIDD and APA Adaptive Functioning Standards	
AAMD 8th ed.	Deficits in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales.[8]
AAMR 9th ed.	Limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.[9]
AAMR 10th ed.	Performance that is at least two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills.[10]

[8] AAMD 8th ed. at 11.

[9] AAMR 9th ed. at 5.

[10] AAMR 10th ed. at 13, 14.

AAIDD 11th ed.	Performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills.[11]
DSM-III-R	Concurrent deficits or impairments in adaptive functioning, i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group in areas such as social skills and responsibility, communication, daily living skills, personal independence, and self-sufficiency.[12]
DSM-IV-TR	Significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/ interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.[13]

[11] AAIDD 11th ed. at 43.

[12] DSM-III-R at 32.

[13] DSM-IV-TR at 41.

DSM-5	At least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.[11]

[11] DSM-5 at 38. The DSM-5 also requires that, "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A." *Id.*

Supreme Court, U.S.
FILED
SEP 13 2016
OFFICE OF THE CLERK

No. 15-797

In the Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, LOUISIANA, MISSOURI, NEVADA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

MARK BRNOVICH
Attorney General

JOHN R. LOPEZ IV
Solicitor General

LACEY STOVER GARD
Chief Counsel
Capital Litigation Section
Counsel of Record

JEFFREY L. SPARKS
Assistant Attorney General

OFFICE OF THE ARIZONA
ATTORNEY GENERAL
1275 W. Washington
Phoenix, Arizona 85007-2997
(602) 542-4686
cadocket@azag.gov

Counsel for Amici Curiae

[Additional Counsel Listed on Inside Cover]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

LUTHER STRANGE
Attorney General
State of Alabama

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA H. COFFMAN
Attorney General
State of Colorado

PAMELA JO BONDI
Attorney General
State of Florida

SAM OLENS
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

CHRIS KOSTER
Attorney General
State of Missouri

ADAM PAUL LAXALT
Attorney General
State of Nevada

E. SCOTT PRUITT
Attorney General
State of Oklahoma

BRUCE R. BEEMER
Attorney General
Commonwealth of Pennsylvania

ALAN WILSON
Attorney General
State of South Carolina

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

SEAN D. REYES
Attorney General
State of Utah

CAPITAL CASE

QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of intellectually disabled capital offenders and expressly "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317.

The question presented is: Does the Eighth Amendment prohibit the States from taking any meaningful role in defining intellectual disability for enforcement of *Atkins*' constitutional restriction and require them to adopt standards that strictly conform to professional medical associations' most current clinical definitions of intellectual disability?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THERE IS NO "NATIONAL CONSENSUS" AMONG THE STATES EMBRACING MEDICAL ASSOCIATIONS' VERY LATEST DIAGNOSTIC STANDARDS FOR INTELLECTUAL DISABILITY 4

A. Texas' intellectual disability criteria reflect the guidance of professional medical associations while not strictly adhering to clinical practices 4

B. There is no national consensus to adopt the latest clinical definitions of intellectual disability 7

II. *ATKINS* AND *HALL* DO NOT REQUIRE THE STATES TO CEDE THEIR ROLE IN DEFINING INTELLECTUAL DISABILITY AND TO STRICTLY CONFORM TO MENTAL HEALTH ORGANIZATIONS' MOST RECENT DIAGNOSTIC STANDARDS 14

A. This Court has never required the States to relinquish authority for creating standards governing important legal determinations to private professional associations 14

B. This Court should not hand over responsibility for creating the substantive legal standards for determining intellectual disability to private professional associations 21

CONCLUSION 24

APPENDIX

Appendix A State Intellectual Disability Definitions ..... App. 1

Appendix B State Adaptive Functioning/Behavior Standards ..... App. 8

Appendix C AAIDD and APA Intellectual Disability Definitions ..... App. 13

TABLE OF AUTHORITIES

CASES

Allen v. Buss,
558 F.3d 657 (7th Cir. 2009) 18, 19

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Bobby v. Bies,
556 U.S. 825 (2009) 16

Bobby v. Van Hook,
558 U.S. 4 (2009) 20

Bowling v. Commonwealth,
163 S.W.3d 361 (Ky. 2005) 11

Ex parte Briseno,
135 S.W.3d 1 (Tex. Crim. App. 2004) .. 4, 5, 9, 11

Chase v. State,
171 So.3d 463 (Miss. 2015) 13

Chester v. Thaler,
666 F.3d 340 (5th Cir. 2011) 18

Clark v. Arizona,
548 U.S. 735 (2006) 23

Commonwealth v. Bracey,
117 A.3d 270 (Pa. 2015) 9, 13

Gregg v. Georgia,
428 U.S. 153 (1976) 7

Hall v. Florida,
134 S. Ct. 1986 (2014) ..... *passim*

In re Hawthorne,
105 P.3d 552 (Cal. 2005) 9, 11

Ex parte Hearn,
310 S.W.3d 424 (Tex. Crim. App. 2010) 5

Hill v. Humphrey,
662 F.3d 1335 (11th Cir. 2011) 18

Hodges v. State,
55 So.3d 515 (Fla. 2010) 11

Kansas v. Crane,
534 U.S. 407 (2002) 19

Kansas v. Hendricks,
521 U.S. 346 (1997) 19

Lane v. State,
169 So. 3d (Ala. Crim. App. 2013) 11

Larry v. Branker,
552 F.3d 356 (4th Cir. 2009) 18

Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600 (11th Cir. 2016) 17

Ex parte Moore,
470 S.W.3d 481 (Tex. Crim. App. 2015) . . . 4, 5, 6

Moormann v. Schriro,
672 F.3d 644 (9th Cir. 2012) 18

Ochoa v. Workman,
669 F.3d 1130 (10th Cir. 2012) 18

Oregon v. Ice,
555 U.S. 160 (2009) 1

Penry v. Lynaugh,
492 U.S. 302 (1989) 3, 7, 14

Pruitt v. State,
834 N.E.2d 90 (Ind. 2005) 12

Sasser v. Hobbs,
735 F.3d 833 (8th Cir. 2013) 11

State v. Agee,
364 P.3d 971 (Or. 2015) 13

State v. Lott,
779 N.E.2d 1011 (Ohio 2002) 9, 11

State v. Maestas,
316 P.3d 724 (Kan. 2014) 12

State v. Pruitt,
415 S.W.3d 180 (Tenn. 2013) 11

Strickland v. Washington,
466 U.S. 668 (1984) 20

Trop v. Dulles,
356 U.S. 86 (1958) 7

Wiggins v. Smith,
539 U.S. 510 (2003) 20, 23

Ybarra v. States,
247 P.3d 269 (Nev. 2011) 12

STATUTES

A.R.S. § 13-753(K) 9

A.R.S. § 13-753(K)(1) 11

ARK. CODE § 5-4-618(a)(1) 9

COLO. REV. STAT. § 18-1.3-1101(2) 9
FLA. STAT. § 921.137(1) 9
GA. CODE § 17-7-131(a)(3) 9
IDAHO CODE § 19-2515A(1) 9, 11
IND. CODE § 35-36-9-2 9
IND. CODE § 35-36-9-3(c) 9
KAN. STAT. §§ 21-6622 . . . . . 9, 12
KY. REV. STAT. § 532.130(2) 9
LA. CODE CRIM. P. ART. 905.5.1 13
MO. REV. STAT. § 565.030(6) 9, 11
NEV. REV. STAT. § 174.098(7) 9
N.C. GEN. STAT. § 15A-2005(a)(1)(a) 9
N.C. GEN. STAT. § 15A-2005(a)(1)(b) 11
OKLA. STAT. TIT. 21, § 701.10b(A)(1) 9
OKLA. STAT. TIT. 21, § 701.10b(A)(2) 11
OKLA. STAT. TIT. 21, § 701.10b(B) 9
S.C. Code § 16-3-20(C)(b)(10) 9
S.D. CODIFIED LAWS § 23A-27A-26.2 9
TENN. CODE § 39-13-203(a) 9
UTAH CODE § 77-15a-102 . . . . . 9, 12
VA. CODE § 19.2-264.3:1.1(A) 9, 12
VA. CODE § 19.2-264.3:1.1(B)(2) 12

WASH. REV. CODE § 10.95.030(2)(a) 9

WASH. REV. CODE § 10.95.030(2)(d) 11

WYO. STAT. § 8-1-102(a)(xiii) 9

OTHER AUTHORITIES

American Association on Intellectual and Developmental Disabilities (11th ed. 2010) 9, 10, 13

American Association on Mental Deficiency, *Classification in Mental Retardation* (8th ed. 1983) 11

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 9, 10, 11

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) 9, 10, 12

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. revised 1987) 11

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) . . . . . *passim*

APA's *Diagnostic and Statistical Manual* (4th ed. text revision 2000) . . . . . *passim*

APA Official Actions, *Position Statement on Moratorium on Capital Punishment in the United States*, December 2014, available at http://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2014-Moratorium-Capital-Punishment.pdf 22

INTEREST OF *AMICI CURIAE*

The States *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondent. The States have a vital interest in the administration of criminal justice, particularly regarding capital crimes committed in their jurisdictions. *See Oregon v. Ice*, 555 U.S. 160, 170 (2009) ("[T]he authority of States over the administration of their criminal justice systems lies at the core of their sovereign status."). When this Court decided *Atkins*, it expressly "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction" on capital punishment for intellectually disabled offenders. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). And in *Hall*, the Court emphasized that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014). This case tests the continuing validity of these principles.

Petitioner—and his *Amici*—contend that the States have no role to play in defining the substantive criteria for determining when an offender otherwise eligible for the death penalty is intellectually disabled and thus falls within *Atkins*' Eighth Amendment restriction. In their view, the sole responsibility for defining this constitutional standard rests with private associations comprised of mental health professionals, and any state law that does not strictly adhere to these associations' most current clinical standards violates the Eighth Amendment. A decision in favor of Petitioner would have the unprecedented result of stripping the States of their ability to play any part in crafting substantive

criteria for sentencing offenders convicted of capital murder. Such a decision would substantially impact crucial State interests in decision-making concerning traditional police powers. Furthermore, it would hinder the creation of workable intellectual disability standards in the context of capital punishment, as well as finality and closure for murder victims' families.

SUMMARY OF ARGUMENT

Petitioner's challenge to Texas' framework for determining intellectual disability claims rests on the premise that *Atkins* and *Hall* sideline the States from playing any meaningful role in creating the legal standards for implementing the constitutional restriction against executing intellectually disabled offenders. According to Petitioner and his *Amici*, the States are constitutionally mandated to employ most recent clinical, diagnostic criteria developed by mental health organizations for determining intellectual disability. They argue, therefore, that because Texas does not strictly follow the most recent clinical practices, its law contravenes *Atkins*, *Hall*, and the Eighth Amendment.

Additionally, *Amicus* The Constitution Project contends that Texas' standards for determining whether an offender is intellectually disabled render it an "outlier" among the States, suggesting there is a national consensus establishing its invalidity.

Both contentions fail.

First, a review of the standards employed by the States for determining intellectual disability in capital cases makes clear that although the States use standards and definitions that are informed by the

medical profession, the overwhelming majority of death penalty States have declined to embrace wholesale the medical profession's very latest clinical standards. Because there is no "national consensus" among the States contrary to Texas' challenged framework, Texas is not an "outlier" and the "clearest and most reliable objective evidence of contemporary values" fails to support any claim that it is unconstitutional. *See Hall*, 134 S. Ct. at 2002 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

Furthermore, *Atkins* and *Hall* did not limit the States' role to the rote administrative task of simply amending their statutes to conform each time the American Psychiatric Association ("APA") or American Association on Intellectual and Developmental Disabilities ("AAIDD") publishes new clinical criteria for diagnosing intellectual disability. Contrary to Petitioner's assertions, neither case held that "current diagnostic criteria" constitute the constitutional standard for implementing the Eighth Amendment ban on capital punishment for the intellectually disabled.

Rather, in *Atkins*, this Court explicitly left to the States the responsibility for creating substantive and procedural criteria for implementing the Eighth Amendment restriction. Then, in *Hall*, although it concluded that Florida's failure to account for standard error of measurement in IQ testing violated the Eighth Amendment, the Court nonetheless emphasized that intellectual disability's legal determination is distinct from a medical diagnosis. The Court's recognition of the States' crucial role in creating substantive criteria for important legal determinations is consistent with its precedent in other contexts, which acknowledges that,

while relevant professional associations may develop standards that inform or guide legal analysis, they do not govern. Nor should they; policy demands that the States, not private professional associations, hold the ultimate responsibility for drafting important legal standards, especially in the administration of criminal justice.

ARGUMENT

I. THERE IS NO "NATIONAL CONSENSUS" AMONG THE STATES EMBRACING MEDICAL ASSOCIATIONS' VERY LATEST DIAGNOSTIC STANDARDS FOR INTELLECTUAL DISABILITY.

A. Texas' intellectual disability criteria reflect the guidance of professional medical associations while not strictly adhering to clinical practices.

After *Atkins*, the Texas Court of Criminal Appeals adopted the definition of intellectual disability then used by the American Association on Mental Retardation ("AAMR," now the AAIDD) and a similar definition included in the Texas Health and Safety Code. *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004); *see also Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015). That definition of intellectual disability includes three prongs: (1) significantly subaverage intellectual functioning; (2) accompanied by related limitations in adaptive

functioning; (3) the onset of which occurs before age of 18.[1] *Briseno*, 135 S.W.3d at 7.

In determining whether an offender meets the second prong—impaired adaptive functioning—the Texas courts have "cited with approval" the 1992 edition of the AAMR's grouping of adaptive behavior into three areas: conceptual skills, social skills, and practical skills. *Moore*, 470 S.W.3d at 488 (citing *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010)). Additionally, the Texas courts have recognized the APA's position, expressed in the APA's *Diagnostic and Statistical Manual* (4th ed. text revision 2000) ("DSM-IV-TR"), "that for purposes of clinical diagnosis, a 'significant limitation' is defined by a score of at least two standard deviations below" the mean in an adaptive behavior skill area or the overall score for all three areas. *Id.* (citing *Hearn*, 310 S.W.3d at 428).

Petitioner and his *Amici* cannot contend that Texas' definition of intellectual disability and conception of adaptive functioning is not "informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. Indeed, in developing its standards and

---

[1] Nearly every State—as well as past and present iterations of the professional associations' publications—uses this basic three-prong definition. *See* App. A, C. This brief includes Appendices consisting of charts listing State, AAIDD, and APA definitions of intellectual disability and of impairment or deficits in adaptive functioning. Citations of "App.__" refer to these Appendices. The chart does not include those twenty States that do not currently provide for capital punishment. Since *Atkins*' limitation on which offenders may be subjected to the death penalty is immaterial in those States, they would have no reason to espouse a view regarding how such offenders should be identified. *See Hall*, 134 S. Ct. at 2004 (Alito, J., dissenting).

framework for determining intellectual disability, the Texas courts drew from the very same clinical definitions to which this Court looked in *Atkins*. *See* 536 U.S. at 308 n.3.

Petitioner, and several of his *amici* nevertheless maintain that Texas' approach to determining intellectual disability is unconstitutional. To that end, they focus on the holding below that the trial court erred by ignoring Texas' established framework for assessing intellectual disability and instead applying the AAIDD's most recent definition. *See Moore*, 470 S.W.3d at 486. And in doing so, The Constitution Project frames the analysis as whether there is a national consensus "forbid[ding] ... the use of modern medical standards in *Atkins* cases." (Br. *Amicus Curiae* of The Constitution Project at 10.)

But The Constitution Project mischaracterizes the Texas court's conclusion and thus misses the relevant question. The court below did not "forbid" the use of the most recent clinical definitions. Instead, it required the lower courts to apply Texas' established legal standards for assessing claims of intellectual disability.

The relevant inquiry, therefore, is whether there is a national consensus among the States to amend their intellectual disability statutes to adopt the most recently published clinical definitions and criteria. Answering that question demonstrates that the Eighth Amendment challenge to Texas' intellectual disability criteria fails because the States have overwhelmingly retained their intellectual disability standards adopted before or shortly after *Atkins* was decided and have not rushed to amend them to strictly conform to the newest AAIDD manual or DSM.

B. There is no national consensus to adopt the latest clinical definitions of intellectual disability.

As reaffirmed once again in *Hall*, in enforcing the Eighth Amendment's ban on "cruel and unusual punishments," this Court "looks to the 'evolving standards of decency that mark the progress of a maturing society.'" 134 S. Ct. at 1992 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). And to discern the nation's evolving moral standards, the Court has long recognized that the laws enacted by the State legislatures provide the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). That is true because "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976) (opinion of Justices Stewart, Powell, and Stewart) (quotation omitted). Consistent with this framework, when the Court analyzed whether the Eighth Amendment barred the execution of intellectually disabled offenders in *Atkins*, and whether assessment of IQ required taking into account the standard error of measurement in *Hall*, it examined whether the actions of the States reflected a national consensus on those issues. *Hall*, 134 S. Ct. at 1996–98; *Atkins*, 536 U.S. at 313–18.

In the view of The Constitution Project, Texas is an "outlier" in "forbidding the use of modern medical standards." (Br. of The Constitution Project at 13.) Despite this bold contention, The Constitution Project makes no meaningful attempt (and Petitioner makes no attempt at all) to establish that Texas is the only

State not to have joined in some "national consensus" to adopt the medical community's latest prescriptions for its legal standard to determine intellectual disability. Nor could it: there is no such national consensus and Texas is not an "outlier" among the States.

Viewed correctly, *i.e.*, focusing on Texas' use of intellectual disability criteria consistent with those relied upon by this Court in *Atkins*, it becomes clear that Texas is not an "outlier," but rather stands among the overwhelming majority of death penalty States that have declined to adopt medical associations' latest criteria for diagnosing intellectual disability. Despite mental health associations making changes to their definitions and standards regarding intellectual disability in recent years, the States by and large have retained their legal definitions adopted before or shortly after this Court decided *Atkins*. And because there is no national consensus against Texas' approach, the "clearest and most reliable objective evidence of contemporary values" fails to support any claim that it is unconstitutional. *Hall*, 134 S. Ct. at 2002 (quoting *Atkins*, 536 U.S. at 312).

If The Constitution Project were correct that Texas is an outlier because it has not adopted these professional associations' most recent diagnostic definitions, one would expect the majority of the States to have adopted either the AAIDD's or the APA's (or both organizations') latest clinical definitions and standards for diagnosing intellectual disability. But that is not the case.

First, by using the term "significantly subaverage" or "significant subaverage" intellectual functioning, an

overwhelming majority of twenty-four States with capital punishment reflect the AAMR 9th ed.[2] and DSM-IV-TR definitions of intellectual disability, both of which this Court referred to in *Atkins*.[3] A.R.S. § 13-753(K); ARK. CODE § 5-4-618(A)(1); COLO. REV. STAT. § 18-1.3-1101(2); FLA. STAT. § 921.137(1); GA. CODE § 17-7-131(a)(3); IDAHO CODE § 19-2515A(1); IND. CODE §§ 35-36-9-2, 35-36-9-3(c); KAN. STAT. §§ 21-6622; KY. REV. STAT. § 532.130(2); MO. REV. STAT. § 565.030(6); NEV. REV. STAT. § 174.098(7); N.C. GEN. STAT. § 15A-2005(a)(1)(a); OKLA. STAT. TIT. 21, § 701.10b(A)(1), (B); S.C. CODE § 16-3-20(C)(b)(10); S.D. CODIFIED LAWS § 23A-27A-26.2; TENN. CODE § 39-13-203(a); UTAH CODE § 77-15A-102; VA. CODE § 19.2-264.3:1.1(A); WASH. REV. CODE § 10.95.030(2)(a); WYO. STAT. § 8-1-102(a)(xiii); *In re Hawthorne*, 105 P.3d 552, 554 (Cal. 2005); *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002); *Commonwealth v. Bracey*, 117 A.3d 270, 274 (Pa. 2015); *Ex parte Briseno*, 135 S.W.3d 1, 7–8 (Tex. Ct. Crim. App. 2004); *see also Atkins*, 536 U.S. at 308 n.3 (quoting AAMR 9th ed. and DSM-IV-TR).

Next, the variety of approaches utilized by the States to define impairments or deficits in adaptive functioning similarly demonstrate the lack of any

---

[2] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992).

[3] While both the AAMR 9th ed. and the DSM-IV-TR stated that intellectual disability included "significantly subaverage" intellectual functioning, both publications omitted that language in subsequent editions. For example, the AAMR 10th ed. and AAIDD 11th ed. use the term "significant limitations" in intellectual functioning and the DSM-5 uses the term intellectual "deficits." *See* Appx. C.

national consensus adopting the latest in clinical and diagnostic criteria. When *Atkins* was decided, both the AAMR 9th ed. and the DSM-IV-TR defined impaired adaptive functioning as limitations in two or more of the following "skill areas": communication, self-care, home living, social skills, use of community resources, self-direction, health and safety, functional academics, leisure, and work. *See* AAMR 9th ed. at 5, 38; DSM-IV-TR at 41; *see also Atkins*, 536 U.S. at 308 n.3. But in its subsequent edition, published shortly after *Atkins*, the AAMR significantly changed its adaptive functioning definition to the following: "performance that is at least two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills."[4] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 13, 14 (10th ed. 2002) ("AAMR 10th ed."). The APA made a similar wholesale change to its definition of adaptive functioning, requiring "at least one domain of adaptive functioning—conceptual, social or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 41 (5th ed. 2013) ("DSM-5").

Despite these significant changes, the most common approach, applied by twelve death penalty States,

[4] The AAIDD retained this definition in its 11th edition. American Association on Intellectual and Developmental Disabilities 43 (11th ed. 2010) ("AAIDD 11th ed.").

continues to employ the AAMR 9th ed. and DSM-IV-TR definition of adaptive functioning. *See* IDAHO CODE § 19-2515A(1); MO. REV. STAT. § 565.030(6); N.C. GEN. STAT. § 15A-2005(A)(1)(B); OKLA. STAT. TIT. 21, § 701.10b(A)(2); *Sasser v. Hobbs*, 735 F.3d 833, 848 (8th Cir. 2013) (Arkansas). *Lane v. State*, 169 So. 3d 1076, 1088–89 (Ala. Crim. App. 2013); *Hawthorne*, 105 P.3d at 556–57; *Hodges v. State*, 55 So.3d 515, 534 (Fla. 2010); *Bowling v. Commonwealth*, 163 S.W.3d 361, 367–68 (Ky. 2005) (quoting *Atkins*); *Lott*, 779 N.E.2d at 1014; *State v. Pruitt*, 415 S.W.3d 180, 204 (Tenn. 2013); *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).

Furthermore, two States use a definition taken from earlier AAIDD and APA standards.[5] *See* A.R.S. § 13–753(K)(1) ("the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group"); WASH. REV. CODE § 10.95.030(2)(d) (same); *see also* American Association on Mental Deficiency, *Classification in Mental Retardation* (8th ed. 1983) ("Deficits in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group ... ."); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 32 (3d ed. revised 1987) ("Concurrent deficits or impairments in adaptive functioning, i.e.,

---

[5] Although the DSM-IV-TR and DSM-5 use a different definition of adaptive functioning, the DSM-5's explanation of adaptive behavior includes language similar to that found in Arizona's and Washington's statutes. *See* DSM-5 at 33.

the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group in areas such as social skills and responsibility, communication, daily living skills, personal independence, and self-sufficiency.").

The remaining States use several different approaches to determine impairments or deficits in adaptive functioning. Indiana and Nevada appear to employ the AAMR 10th ed. and DSM-IV-TR definitions of adaptive functioning, and Virginia uses the AAMR 10th ed. standard. *See* VA. CODE § 19.2-264.3:1.1(A), (B)(2); *Pruitt v. State*, 834 N.E.2d 90, 109–10 (Ind. 2005) (characterizing these standards as a "safe harbor" and noting that statutory standard is "very similar" to AAMR 10th ed.); *Ybarra v. States*, 247 P.3d 269, 274 (Nev. 2011) (referring to AAMR 10th ed. and DSM-IV-TR definitions as providing "useful guidance in applying" statute).

Seven States—Colorado, Georgia, Montana, New Hampshire, South Carolina, South Dakota, and Wyoming—have not defined what constitutes sufficient impairment or deficits in adaptive functioning. Kansas alone does not require any showing of impaired adaptive functioning to establish intellectual disability. Kan. Stat. §§ 21-6622; *State v. Maestas*, 316 P.3d 724, 736–37 (Kan. 2014). And Utah focuses on whether the defendant has significant deficiencies in adaptive functioning "primarily in the areas of reasoning or impulse control." UTAH CODE § 77-15a-102; *see also Atkins*, 536 U.S. at 318 (intellectually disabled have diminished capacity "to engage in logical reasoning, to control impulses"). None of these varied approaches applies the newest AAIDD or APA standards.

Finally, as noted by Respondent (Resp. Br. at 25–26), only four States have adopted either the AAIDD's or the APA's latest clinical standards to define intellectual disability and, therefore, to determine what constitutes sufficiently impaired adaptive functioning. LA. CODE CRIM. P. ART. 905.5.1; *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015); *State v. Agee*, 364 P.3d 971, 989–90 (Or. 2015); *Bracey*, 117 A.3d 270, 274 (Pa. 2015).[6] Four States out of fifty (or out of thirty with capital punishment) is far from a national consensus. Just the opposite. The States' varied approaches to determining impairment or deficits in adaptive functioning shows that, if anything, there is a national consensus *against* adopting the medical associations' latest clinical standards. Texas is not an outlier, but part of a near unanimous majority in declining to adopt the newest clinical criteria published by professional associations.

To be sure, the States' definitions of intellectual disability and standards for determining impaired adaptive functioning do what this Court required in *Atkins* and *Hall*: they are "informed by the views of medical experts." *See Hall*, 134 S. Ct. at 2000. Indeed, the standards reviewed herein are based on such views. *See* App. A–C; *see also* Resp. Br. at Appendix. But there simply is no national consensus to strictly conform to the most recent medical standards contrary to Texas' approach to determining intellectual disability. In the absence of any such consensus, there is no basis to

---

[6] Notably, Pennsylvania has not wholly adopted both the AAIDD's and APA's latest clinical standards. Instead, it approved the use of the AAIDD 11th ed. and the DSM-IV-TR standard in a case where the evidentiary hearing occurred before publication of the DSM-5. *See Bracey*, 117 A.3d at 274; *see also* Resp. Br. at 26–27.

conclude that Texas' use of an intellectual disability framework that does not strictly adhere to the latest clinical criteria conflicts with society's standards of decency. *See Penry*, 492 U.S. at 335. Thus, the "clearest and most reliable objective evidence of contemporary values" fails to support any claim that Texas' approach to determining intellectual disability is unconstitutional. *Hall*, 134 S. Ct. at 2002 (quoting *Atkins*, 536 U.S. at 312).

II. *ATKINS* AND *HALL* DO NOT REQUIRE THE STATES TO CEDE THEIR ROLE IN DEFINING INTELLECTUAL DISABILITY AND TO STRICTLY CONFORM TO MENTAL HEALTH ORGANIZATIONS' MOST RECENT DIAGNOSTIC STANDARDS.

A. This Court has never required the States to relinquish authority for creating standards governing important legal determinations to private professional associations.

Petitioner and his *Amici* view *Atkins* and *Hall* as prohibiting the States from playing any substantive role in creating standards for the determination of intellectual disability in capital cases. Instead, their view would limit the States to the purely administrative task of amending their laws to strictly conform to the most "current medical standards." *See, e.g.*, Pet. Br. at 30; Br. *Amici Curiae* of APA *et al.* at 14; Br. *Amici Curiae* of AAIDD *et al.* at 4. Petitioner premises this argument on the fact that, when describing mental retardation in *Atkins*, and when considering the assessment of IQ scores in *Hall*, the Court cited definitions provided by the AAMR and the APA. Pet. Br. at 27–30.

Of course, in both *Atkins* and *Hall* the Court cited and referred to clinical definitions of intellectual disability. *Hall*, 134 S. Ct. at 1994, 1995, 1998–99, 2001; *Atkins*, 536 U.S. at 308 n.3, 317 n.22. But reference to clinical definitions of intellectual disability hardly equates to adoption of the latest APA and AAIDD diagnostic criteria as the Eighth Amendment standard. Nothing in those cases suggests that the Court stripped the States of their authority to create appropriate standards and outsourced to private professional associations sole responsibility for setting the constitutional standard for implementing the Eighth Amendment restriction against executing intellectually disabled offenders.

Just the opposite is true. In *Atkins*, the Court expressly left to the States the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317. The Court observed that there might be "serious disagreement in determining which offenders are in fact retarded. . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Id.* And it understood that the existing statutory definitions of intellectual disability enacted by the States were "not identical" and only "generally conform[ed]" to the clinical definitions the Court cited. *Id.* n.22. Nowhere in the decision did the Court even suggest, much less announce, that it was relegating the States to the rote task of adopting clinical standards verbatim in their statutes and updating their laws each time the mental health associations change their criteria. If any doubt remained, the Court reaffirmed seven years later that

Atkins "did not provide definitive procedural or substantive guides for determining when a person" is intellectually disabled. *Bobby v. Bies*, 556 U.S. 825, 831 (2009).

Nor did *Hall* impose any such requirement. There, the Court held that a Florida statute requiring an IQ test score of 70 or below, without considering margin of error, before a defendant was permitted to present additional evidence of intellectual disability violated the Eighth Amendment. *Hall*, 134 S. Ct. at 1991–92. The Court found the strict IQ cutoff unconstitutional because it disregarded established medical practice *and* went against a trend in a majority of States toward accounting for the standard error of measurement in IQ testing. *Id.* at 1995, 1998.

Hall does not support the argument that the States are constitutionally mandated to strictly conform to the newest clinical definitions for their intellectual disability determinations. Although the Court did not grant the States "complete autonomy to define intellectual disability as they wished," *Id.* at 1999, it nonetheless reaffirmed that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Id.* at 2000.

In support of his view, Petitioner relies on the Court's statements in *Hall* that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection" or "complete autonomy to define intellectual disability as they wished." Pet. Br. at 29 (quoting *Hall*, 134 S. Ct. at 1998, 1999). That may be true, but neither did the Court hand private professional organizations the keys to constitutional standards by forcing the States to unquestioningly

adopt the APA and AAIDD definitions of intellectual disability and amend their laws every time those organizations tweak or adjust their clinical criteria. To do so would have removed a key function in the administration of criminal justice from its proper authority, the States, and placed it in the hands of "a small professional elite" that may be motivated to expand the definition of intellectual disability for the sole purpose of limiting the States' ability to impose the death penalty. *See Hall*, 134 S. Ct. at 2005 (Alito, J., dissenting).

To the contrary, *Hall* simply acknowledged that the legal standards for determining intellectual disability are "informed by the medical community's diagnostic framework." *Id.* And in reaching its ultimate conclusion about the IQ cutoff at issue, the Court itself did not simply defer to the APA and AAIDD, but rather "express[ed] its own independent determination reached in light of the instruction found in" the medical literature *as well as* legislative policies of the States. *Id.* at 1993.

Furthermore, the conclusion that this Court has not required strict adoption of clinical criteria is firmly supported by the Circuit Courts of Appeal, which have uniformly concluded that the Eighth Amendment does not impose on the States any specific definition of intellectual disability or requirement of strict adherence to clinical standards. *See, e.g., Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 637–38 (11th Cir. 2016) ("[D]istrict courts do not need to revisit rulings every time the APA publishes a revised DSM or the AAIDD publishes a new article. . . . While medical literature informs a

court's legal analysis, it does not control it."); *Moormann v. Schriro,* 672 F.3d 644, 648 (9th Cir. 2012) ("The Supreme Court in *Atkins* did not define mental retardation as a matter of federal law. With respect to mental retardation ... the Supreme Court left to the states 'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (alteration in original)) (quoting *Atkins,* 536 U.S. at 317); *Ochoa v. Workman,* 669 F.3d 1130, 1137 (10th Cir. 2012) (*Atkins* did not mandate any specific substantive criteria for assessing intellectual disability claims); *Chester v. Thaler*, 666 F.3d 340 (5th Cir. 2011) ("*Atkins* clearly did not hold ... that states must employ the AAMR or APA definitions of mental retardation, let alone that they must employ the same underlying clinical analysis that the AAMR and APA use to determine which patients meet each prong of those organizations' definitions."); *Hill v. Humphrey,* 662 F.3d 1335, 1351–52 (11th Cir. 2011) (en banc) ("*Atkins* did not bestow a substantive Eighth Amendment right to a fixed and rigid definition of 'mentally retarded persons.' Indeed, various states use different definitions of intellectual functioning (some draw the line at an IQ of 75 or below, some at 70 or below, others at 65 or below) and consider different factors in assessing adaptive functioning." (footnote omitted)); *Larry v. Branker*, 552 F.3d 356, 369 (4th Cir. 2009) (rejecting argument that Atkins "requires every state to employ a particular 'clinical' approach to measuring a defendant's adaptive skills": "*Atkins* does not require states to use a specific method of determining whether a defendant is mentally retarded; rather, as noted above, *Atkins* expressly left to the states the task of defining mental retardation."); *Allen*

v. Buss, 558 F.3d 657, 665 (7th Cir. 2009) ("[T]he Supreme Court in *Atkins* did *not* establish a national standard for mental retardation but expressly left to the states the task of defining mental retardation." (emphasis in original)).

By looking to medical criteria for guidance, but stopping far short of requiring their strict adoption as constitutional standards, *Atkins* and *Hall* are consistent with this Court's precedent in related contexts that "the science of psychiatry ... informs but does not control ultimate legal determinations." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). In those other contexts, as here, the Court has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) (noting that legal definitions of "insanity" and "competency" "vary substantially from their psychiatric counterparts"); *see also Crane*, 534 U.S. at 407–08 ("psychiatry ... is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law"). As a result, "[l]egal definitions ... which must 'take into account such issues as individual responsibility ... and competency' need not mirror those advanced by the medical profession." *Hendricks*, 521 U.S. at 359 (quoting the DSM-IV).

It is not only in relation to medical determinations that the Court has declined to adopt private associations' standards or criteria as constitutional requirements. In an analogous context, this Court has declined to cede control over the standard of reasonable attorney performance under the Sixth Amendment to the American Bar Association ("ABA"), a private

professional association like the APA and AAIDD. Rather, the Court has recognized that while the ABA's guidelines for counsel might serve as "guides to determining what is reasonable, ... *they are only guides*." *Wiggins v. Smith*, 539 U.S. 510, 546–47 (2003) (emphasis in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *see also Bobby v. Van Hook*, 558 U.S. 4, 14 (2009) (Alito, J., concurring) ("It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination."). The Court has never suggested that the ABA is responsible for setting the Sixth Amendment standard of reasonable performance by defense counsel; nor would it be appropriate to do so. Similarly here, although the Court acknowledged in *Atkins* and *Hall* that the legal determination of intellectual disability is "informed" by the standards used by professional medical associations, it has never ceded control over the standards to those associations, nor should it.

Instead, recognizing the distinctions between intellectual disability's legal determination and medical diagnosis, and respecting the States' authority over the administration of criminal justice, the Court has left to the States the task of creating substantive criteria for identifying those offenders whose "disabilities in areas of reasoning, judgment, and control of their impulses" prevent them from acting "with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 307. In sum, the States retain their prerogative

under *Atkins* and *Hall* to develop both legal processes and substantive legal standards– which are not constitutionally required to strictly conform to recommended clinical practices—for determining when an otherwise death-eligible offender is intellectually disabled.

B. This Court should not hand over responsibility for creating the substantive legal standards for determining intellectual disability to private professional associations.

It is for good reason that this Court has never required the States to strictly conform to the medical community's clinical criteria for legal determinations or adopted wholesale private associations' guidelines as constitutional standards. First, consistent with this Court's recognition of the differences between medical diagnoses and related legal determinations, the APA itself suggests that its clinical criteria should not be adopted wholesale as legal standards, warning of the "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5 at 25. It specifically states that "[i]n most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability ... *does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard* . . . ." *Id.* (emphasis added). And, particularly relevant to the issue of moral culpability and intellectual disability, the APA cautions that "additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the

individual's functional impairments and how these impairments affect the particular abilities in question." *Id.*

Second, the Court should not entrust the creation of constitutional standards central to the administration of criminal justice to professional organizations that may have agendas at odds with the States' interest in the orderly administration of their criminal justice systems. For example, the APA has expressed institutional hostility to the death penalty, a punishment that the laws of thirty States and the United States deem valid and proper, by advocating for a nationwide moratorium on its use. APA Official Actions, *Position Statement on Moratorium on Capital Punishment in the United States*, December 2014, available at http://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2014-Moratorium-Capital-Punishment.pdf. This policy agenda is not only contrary to those States with capital punishment, but also to *Atkins* itself, which conceived of a narrow exception to eligibility for the death penalty for those intellectually disabled "offenders about whom there is a national consensus." 536 U.S. at 317.

Third, tying constitutional standards to the views of professional organizations would likely prove impractical. The current diagnostic criteria utilized by professional associations often change,[7] which would require frequent statutory amendments, and surely additional litigation, with each adjustment to clinical standards. And as the APA admits, "[t]he AAIDD Manual and DSM-5 definitions of intellectual disability

[7] *See* App. C.

differ in some particulars." Br. of APA at 7 n.3. If the views of professional organizations set the constitutional standard, but those views differ, how are the States, or the courts for that matter, to decide which standard the Eighth Amendment requires? *Cf. Clark v. Arizona*, 548 U.S. 735, 753 (2006) ("There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.").

Finally, as this Court recently acknowledged, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 2000. For purposes of capital punishment, intellectual disability is important due to the diminished moral culpability resulting from deficiencies in understanding information, communication, learning, reasoning, and impulse control, and an impaired understanding of execution as a penalty. *See Atkins*, 536 U.S. at 318, 320. Consequently, in making a legal determination of intellectual disability, "additional information is usually required beyond" a clinical diagnosis, "which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question." DSM-5 at 25.

In sum, it is the prerogative and responsibility of the States, not private professional associations, to formulate the substantive criteria for determining intellectual disability in capital cases. Medical standards provide a guide for the States in doing so, but "they are only guides." *Cf. Wiggins*, 539 U.S. at 546–47 (emphasis omitted). The States must not be relegated to the administrative task of conforming their

statutes to the professional associations' latest criteria, but rather must retain the crucial authority to develop substantive standards for the administration of their criminal justice systems.

CONCLUSION

The Court should affirm the decision of the Texas Court of Criminal Appeals.

Respectfully submitted.

MARK BRNOVICH
Attorney General of Arizona

JOHN R. LOPEZ IV
Solicitor General

LACEY STOVER GARD
Chief Counsel
Capital Litigation Section
Counsel of Record

JEFFREY L. SPARKS
Assistant Attorney General
Capital Litigation Section

OFFICE OF THE ARIZONA
ATTORNEY GENERAL
1275 W. Washington
Phoenix, Arizona 85007
(602) 542–4686
cadocket@azag.gov

Counsel for Amici Curiae

September 13, 2016

Supreme Court, U.S.
FILED
AUG 4 - 2016
OFFICE OF THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

VIRGINIA E. SLOAN
SARAH TURBERVILLE
THE CONSTITUTION PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, DC 20036

MEIR FEDER
Counsel of Record
IAN SAMUEL
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939
mfeder@jonesday.com

Counsel for Amicus Curiae

August 4, 2016

Library of Congress

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. TEXAS HAS CREATED A DELIBERATELY IDIOSYNCRATIC DEFINITION OF INTELLECTUAL DISABILITY FOR *ATKINS* CASES 5

II. TEXAS IS THE ONLY STATE TO REQUIRE THE USE OF THE *BRISENO* FACTORS AND FORBID THE USE OF MODERN CLINICAL STANDARDS 10

III. THE TEXAS DEATH PENALTY SYSTEM IS AN OUTLIER EVEN WITHIN TEXAS 14

CONCLUSION 18

APPENDIX: Members of the Constitution Project's Death Penalty Committee 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Chase v. State,
171 So. 3d 463 (Miss. 2015) 11

Commonwealth v. DeJesus,
58 A.3d 62 (Pa. 2012) 12

Commonwealth v. Williams,
61 A.3d 979 (Pa. 2013) 13

Eddings v. Oklahoma,
455 U.S. 104 (1982) 17

Ex Parte Briseno,
135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Hall v. Florida,
134 S. Ct. 1986 (2014) ..... *passim*

Hall v. Thaler,
562 U.S. 981 (2010) 9

In re Hawthorne,
105 P.3d 552 (Cal. 2005) 11, 12

Lockett v. Ohio,
438 U.S. 586 (1978) 4, 5, 17

Penry v. Lynaugh,
492 U.S. 302 (1989) 6, 7, 13

Pruitt v. State,
834 N.E. 2d 90 (Ind. 2005) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Rummel v. Estelle,
445 U.S. 263 (1980) 13

State v. Agee,
364 P.3d 971 (Or. 2015) 10

Trop v. Dulles,
356 U.S. 86 (1958) 13

STATUTES

19 Tex. Admin. Code §89.1040 15

37 Tex. Admin. Code §380.8751 ..... 15. 16

37 Tex. Admin. Code §380.8775 15

OTHER AUTHORITIES

4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1765) 18

The Constitution Project, IRREVERSIBLE ERROR (2014) 2

Paul Duggan, *Texas Ban on Executing Retarded is Rejected*, Wash. Post, June 18, 2001 7

H.R. 614, 78th Leg., Reg. Sess. (Tex. 2003) 9

THE OXFORD COMPANION TO THE MIND (O.L. Zangwill & Richard L. Gregory eds., 1987) 14

William Stern, THE PYSCHOLOGICAL METHODS OF TESTING INTELLIGENCE (1914) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Peggy Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1 (2011) 6, 9, 12

INTEREST OF *AMICUS CURIAE*[1]

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. One of the Project's key areas of focus is the constitutional imperative of procedural fairness and due process in the criminal justice system, and particularly in the administration of capital punishment. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files *amicus* briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues.

The Project takes no position on the abolition or maintenance of the death penalty. Rather, it focuses on forging consensus-based recommendations aimed at achieving the common objectives of justice for both victims of crimes and for those accused of committing crimes. In May 2001, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Dem-

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Counsel for both parties have filed with the Clerk their blanket consent to the filing of *amicus curiae* briefs.

ocrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others, to examine issues related to the administration of the death penalty. A complete list of the members of the Project's Death Penalty Committee, which includes a former Governor of Texas, is reproduced in the appendix to this brief.

Consistent with these stated goals, the committee has released three reports in which it has identified areas where the administration of the death penalty fails to protect adequately defendants' Constitutional rights, and provided recommendations to correct these deficiencies. Its most recent report makes 39 such recommendations that the committee believes are essential to reducing the risk of wrongful capital convictions and executions. See The Constitution Project, IRREVERSIBLE ERROR (2014).

As this Court recognized in *Atkins v. Virginia*, 536 U.S. 304 (2002), and recently reaffirmed in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Eighth Amendment of the Constitution prohibits the execution of the intellectually disabled. While the task of determining who is intellectually disabled is left to the states, both *Atkins* and *Hall* make clear that this determination cannot be made without reference to current medical standards. Given "the stakes in a death penalty case," it is essential, in the committee's view, to "ensure that all defendants with intellectual disability are identified and afforded the constitutional protections associated with that diagnosis." IRREVERSIBLE ERROR 75.

SUMMARY OF ARGUMENT

When it comes to diagnosing intellectual disability in death penalty cases, Texas is an outlier—and not by accident. After this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), Texas responded with *Ex Parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). *Briseno* restricted *Atkins*' holding to those individuals with intellectual disabilities that "a consensus *of Texas citizens* would agree" ought to be "exempted from the death penalty." *Id.* (emphasis added). The CCA did this by creating a set of non-clinical "factors" (such as whether those "who knew the person best" during childhood thought "he was mentally retarded at that time," and if so, whether they said so to anyone), which factors were designed deliberately to be different from the "definition of mental retardation that is used for providing psychological assistance, social services, and financial aid." *Id.*, at 8. This idiosyncratic approach was unique to the Texas death penalty system the day it was created, and has remained so ever since. The decision below further deepens the idiosyncrasy by requiring that the *Briseno* factors be used *to the exclusion* of modern clinical criteria. The result is that Texas is an outlier in two crucial respects.

First, Texas is alone among States in forbidding the use of modern diagnostic criteria for intellectual disability and requiring, instead, the use of its outdated and non-clinical *Briseno* factors in *Atkins* cases. No other State forbids the use of modern diagnostic criteria, as Texas does, and many States affirmatively require the use of the most up-to-date standards. Nor has any other State mandated the use of the *Briseno* factors, and only one State has even ap-

proved their use permissively. As in *Atkins*, this "consensus" among States other than Texas "unquestionably reflects widespread judgment" that it is inappropriate to use outdated, non-clinical standards, and to forbid consideration of more modern ones. 536 U.S., at 317.

Second, Texas' *Atkins* procedures are an outlier *within* Texas, which does not use the non-clinical *Briseno* factors when diagnosing intellectual disability in any context *other* than determining eligibility for the death penalty. When Texas must assess whether a public-school student or juvenile offender is intellectually disabled, it uses modern clinical definitions. Perversely, it is *only* when making decisions about the death penalty that Texas requires the use of the non-clinical and outdated *Briseno* factors, and forbids the use of modern standards. But as this Court has often held, the "qualitative difference between death and other penalties" requires a "*greater* degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added).

The judgment below should therefore be reversed.

ARGUMENT

The court below acknowledged that society's "conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided," but held that Texas courts are forbidden to use "the most current position ... espoused" by leading medical organizations, and instead must use "the test ... established in *Briseno*." Pet. App. 6a. As the petitioner correctly argues, that rule cannot be squared with this Court's decision in *Hall v. Florida*, which recog-

nized that society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue," such that in "determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct. 1986, 1993 (2014). This Court, in *Hall*, thought it relevant whether the State of Florida's *Atkins* regime was "consistent with the views of the medical community." *Id.* at 1994. Texas requires the opposite, and this Court need go no further than that to reverse the judgment below. *Amicus* will not restate that argument here.

Rather, the purpose of this filing is to illustrate the extent to which Texas is an outlier, and the legal consequences of that outlier status. In the wake of *Atkins*, Texas chose to deliberately set its death penalty system apart—both from other death penalty States, and from the way intellectual disability is ordinarily treated under Texas law. The consequence is that Texas is out of step both with the "widespread judgment" about intellectual disability made by other States, *Atkins*, 536 U.S., at 317, as well as the requirement that States ensure a "*greater* degree of reliability when the death sentence is imposed," *Lockett*, 438 U.S. at 604 (emphasis added).

I. TEXAS HAS CREATED A DELIBERATELY IDIOSYNCRATIC DEFINITION OF INTELLECTUAL DISABILITY FOR *ATKINS* CASES

As this Court is well aware, Texas is an extraordinarily important death penalty jurisdiction: over one-third of executions since 1976 have taken place in that State, and a tenth of the nation's death row pop-

ulation is housed there. See Peggy Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 1 (2011). But "the 'Texas approach' regarding these offenders has not always been well-received" by this Court. *Id.*, at 2–3. In particular, Texas' approach to the execution of intellectually disabled offenders has required frequent correction.

Until this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), Texas juries were not even "provided with a vehicle" to consider evidence of intellectual disability in the penalty phase—that is, juries were not instructed to take it into account even in mitigation. But this Court concluded in *Penry* that this unconstitutionally limited the jury's discretion, which "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." *Ibid.* At the same time, this Court rejected the argument that there was then a national consensus categorically forbidding the execution of the intellectually disabled. *Ibid.*

Texas, however, interpreted this Court's decision in *Penry* narrowly, and took a very limited view of what evidence it required be admitted for the jury's deliberation. See Tobolowsky, *supra*, at 18–21. Following *Penry*, there was a "dramatic increase in the number of states that had enacted bans on the execution of [intellectually disabled] offenders," but Texas was not among them—indeed, the governor of Texas vetoed legislation in 2001 that would have done so. *Id.*, at 24–26. Explaining his veto, which "bucked a nationwide trend," Governor Perry stated that the proposed law had "basically [told] the citizens of this state, 'We

don't trust you.'" Paul Duggan, *Texas Ban on Executing Retarded is Rejected*, Wash. Post, June 18, 2001, at A02.

Thirteen years after *Penry*, this Court concluded in *Atkins* that a national consensus had developed against the execution of the intellectually disabled. 536 U.S. 304 (2002). After this Court decided *Atkins*, the Texas Court of Criminal Appeals received "a significant number" of "habeas corpus applications" by death row inmates, arguing that they were exempt from execution under *Atkins*. *Ex Parte Briseno*, 135 S.W. 3d at 5. The CCA therefore developed what it styled "temporary judicial guidelines in addressing *Atkins* claims," under the assumption that the Texas legislature would eventually provide more detailed guidance. *Ibid.*

The *Briseno* court did not understand its objective to be, as *Atkins* put it, simply developing procedures aimed at "determining which offenders are in fact" intellectually disabled. 536 U.S., at 317. It was that essentially procedural "task" that this Court left "to the States," having already determined that a substantive national consensus existed against the execution of the intellectually disabled. *Ibid.* (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)). Instead, the *Briseno* court undertook to define "that level and degree of [intellectual disability] at which a *consensus of Texas citizens* would agree that a person should be exempted from the death penalty." *Briseno*, 135 S.W. 3d, at 6 (emphasis added).

Briseno, in other words, embraced a sort of "'Texan exceptionalism" approach to the Eighth Amendment. "Most Texas citizens might agree that Steinbeck's

Lennie" ought not be executed. *Briseno* reasoned. *Ibid.* But would a "consensus of Texas citizens agree that all persons who might legitimately qualify ... under the social services definition of [intellectual disability] be exempt?" *Ibid.* Is there, *Briseno* wondered, a "Texas consensus" that "all of those persons whom the mental health profession might diagnose as meeting the criteria for [intellectual disability]" are exempt from the death penalty? *Ibid.* Did Texans believe in a "bright-line exemption from our state's maximum statutory punishment?" *Ibid.* These were the questions that *Briseno* asked--despite there being little room in the logic of *Atkins*, which discerned a (necessarily substantive) *national* consensus, for any of them.

In seeking to answer this question, the court in *Briseno* first quoted a 1992 set of clinical guidelines, which defined intellectual disability as being characterized by "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." *Id.*, at 7–8. Channeling an imagined "consensus of Texas citizens," however, the *Briseno* court criticized the clinical "adaptive behavior" criterion as "exceedingly subjective," and thus significantly altered the clinical definition by adding "other evidentiary factors" that the court said factfinders should "focus upon." *Id.*, at 8.

These factors, which would come to be known as the "*Briseno* factors," require consideration of (for example) whether the defendant's "family" or "friends" thought he was intellectually disabled during childhood, and if they did, whether they "act[ed] in accordance" with that determination; whether the de-

fendant has "formulated plans" and is able to "hide facts or lie"; and whether the crime for which he was convicted required "forethought." *Id.*, at 8–9. These factors are all entirely *ad hoc* and non-clinical, and in announcing them, the court did not identify or rely on a single authority: they simply appear as a bulleted list, unadorned by citation. *Ibid.*

Though ostensibly designed to be temporary guidelines, the *Briseno* factors have remained the operative standard in Texas ever since. The Texas legislature made several unsuccessful attempts to enact a statutory standard and procedures to govern *Atkins* claims. See Tobolowsky, *supra*, at 33–35. In 2003, the Texas House of Representatives passed a bill that would have similarly created a more restrictive definition of intellectual disability in death penalty cases than used for other State purposes. See H.R. 614, 78th Leg., Reg. Sess. (Tex. 2003). Instead of simply requiring "deficits in adaptive behavior," for example, the 2003 legislation would have required that those deficits be "significant" when "normed" against the defendant's "cultural group." *Ibid.*; see Tobolowsky, *supra*, at 33 n.177. But the Texas Senate did not consider the 2003 legislation. Tobolowsky, *supra*, at 34. Further attempts to respond to *Atkins* legislatively have generally not made it past committee review in the legislature. *Id.* at 34-35; see also generally Brief of Texas State Senator Rodney Ellis et al., as Amici Curiae in Support of Petitioner at 5–10, *Hall v. Thaler*, 562 U.S. 981 (2010) (No. 10-37) (describing unsuccessful attempts to enact *Atkins* legislation).

As the decision below illustrates, the *Briseno* framework is therefore the *exclusive* mechanism by which *Atkins* claims are evaluated in Texas—trial-

court judges are forbidden to rely on more up-to-date medical standards. As discussed below, that has made Texas an outlier, in more ways than one.

II. TEXAS IS THE ONLY STATE TO REQUIRE THE USE OF THE *BRISENO* FACTORS AND FORBID THE USE OF MODERN CLINICAL STANDARDS

Given that the *Briseno* court thought its task was to craft a Texas-specific definition of intellectual disability, it is no surprise that the decision has left Texas isolated. The decision below deepens that isolation: No other death penalty State forbids, as the court below did here, the use of modern medical standards in *Atkins* cases. The States to consider the question explicitly often *require* the use of the most modern standards; at minimum, however, they permit it, or simply assume the relevance of the most up-to-date standards. *Amicus* is aware of no other death penalty jurisdiction, however, that *forbids* the use of current medical standards for diagnosing intellectual disability.

In Oregon, for example, the State's highest court recently reversed a trial-court ruling that "comported with the published [medical] standards existing at the time," but that had not had the benefit of the revised standards in the subsequently-published DSM-5. *State v. Agee*, 364 P.3d 971, 989 (Or. 2015), adhered to as amended, 370 P.3d 476 (Or. 2016). To do otherwise, the Oregon court reasoned, would "create an unacceptable risk that a person with intellectual disability will be executed." *Id.*, at 990 (quoting *Hall*, 134 S. Ct., at 1990).

Similarly, Mississippi's highest court has concluded that "legal determinations of intellectual disability" must be "informed by established clinical standards," and has expressly adopted the latest "2010 AAIDD and 2013 APA definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of this state." *Chase v. State*, 171 So. 3d 463, 470-71 (Miss. 2015). The *Chase* court understood that to be the consequence of "the reality of evolving standards for determining intellectual disability in the medical community." *Ibid.* And the Mississippi court recognized that *Hall* requires a State to keep up with those standards, by recognizing the "significant role of the medical community in informing legal determinations of intellectual disability." *Ibid.* Thus, the court concluded that "judicial recognition of the new terminology conforms with the directives of *Atkins* and *Hall* and will facilitate legal determinations of intellectual disability by allowing our courts to rely on the newer, generally-accepted definitions most frequently used by modern clinicians." *Ibid.*

The Supreme Court of California has similarly required adherence to the most up-to-date clinical standards. That Court (many years before this Court did the same in *Hall*) rejected a strict IQ cutoff in *Atkins* cases, because "a fixed cutoff is inconsistent with established clinical definitions" and "fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing"—citing the then-current APA and AAMR definitions in support. *In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005). That was, in turn, in accord with the California legislature's decision to derive its statutory

standard for intellectual disability from the "clinical definitions referenced by the high court" in *Atkins*. *Id.*, at 556.

Indiana has also recognized that, at minimum, because "*Atkins* explains that state statutes that provided the 'national consensus' against the execution of the mentally retarded 'generally conform'" to the then-operative clinical definitions, the decision in turn requires State definitions to continue to be at least in "general conformity with those clinical definitions," even if there is some "latitude" within that range. *Pruitt v. State*, 834 N.E. 2d 90, 108 (Ind. 2005). The *Pruitt* court observed that the AAMR definition had recently been "amended," and approved of Indiana's statute because it was "very similar to the revised AAMR definition, *and therefore* within the range of permissible standards under the Eighth Amendment." *Ibid.* (emphasis added).

Not every State, of course, has had this question squarely presented, especially following this Court's decision in *Hall*. But crucially, *amicus* is aware of no State that requires, as Texas does, the use of the non-clinical *Briseno* factors, or that forbids the use of modern medical definitions. In that respect, Texas "has clearly taken a path that differs from the other states" on this issue. Tobolowsky, *supra*, at 142. The closest that any other State's highest court has come to approving the *Briseno* factors is Pennsylvania, but even there the court "adopted the clinical definitions" of intellectual disability, while permitting—but not requiring—the use of the *Briseno* standards as evidentiary factors at the factfinder's discretion. *Commonwealth v. DeJesus*, 58 A.3d 62, 102, 109–10 (Pa. 2012). But unlike in Texas, Pennsylvania does not

regard the *Briseno* factors as "elevated to any particular favored or presumptive status." *Commonwealth v. Williams*, 61 A.3d 979, 982 n.9 (Pa. 2013). That is a stark difference, as this case illustrates. And Texas' outlier insistence on forbidding the use of modern medical standards therefore essentially guarantees disparate outcomes across States.

Texas' outlier status has serious implications for the legality of its system under the Eighth Amendment, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958). In assessing those standards, this Court seeks to be informed by "objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). And the "clearest and most reliable objective evidence" available is the actions of the several States. *Penry*, 492 U.S. at 331. As in *Atkins*, the "large number of States prohibiting the execution" of people who satisfy modern clinical definitions of intellectual disability "provides powerful evidence that today our society views" such offenders as "categorically less culpable than the average criminal." 536 U.S., at 315-16.

In the end, that is the heart of the matter. *Atkins* discerned a national consensus against the execution of the intellectually disabled. Texas permits the execution of offenders who would be deemed ineligible in these other States, therefore greatly increasing the risk that a person with intellectual disability will be executed, and is therefore out of step with the consensus this Court identified in *Atkins*.

III. THE TEXAS DEATH PENALTY SYSTEM IS AN OUTLIER EVEN WITHIN TEXAS

Texas is not just an outlier when compared to other death penalty States, none of which mirror its approach to implementing *Atkins*. Texas' death penalty system is even an outlier within Texas itself: In the other areas in which the State must make determinations about intellectual disability, Texas uses current medical standards and does not rely on the *Briseno* factors.

As this Court has recognized, "the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty," because "it is relevant to education, access to social programs, and medical treatment plans." *Hall*, 134 S. Ct., at 1993. In those contexts, society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Ibid.* Texas, like other States, assesses individuals' intellectual disabilities for these purposes, and in doing so, "relies upon medical and professional expertise" in a way that the decision below does not. *Ibid.*

In the Texas school system, for example, it is often necessary to identify children with special needs who may require individualized assistance. This is common: in fact, the rise of universal public education is what prompted the development of the earliest intelligence tests, including the now well-known "intelligence quotient." See THE OXFORD COMPANION TO THE MIND 88 (O.L. Zangwill & Richard L. Gregory eds., 1987); William Stern, THE PYSCHOLOGICAL METHODS

OF TESTING INTELLIGENCE (1914) (Guy Montrose Whipple, trans.).

But when assessing students for intellectual disability, the Texas school system does not rely on the *Briseno* factors. Instead, it uses a clinical definition (including, for example, requiring consideration of "standard error of measurement"), and omits any requirement that the child's adaptive behavior deficits must be "related to" sub-average general intellectual functioning. See 19 Tex. Admin. Code §89.1040(c)(5). The latter omission was one specifically criticized by the court below as inconsistent with *Briseno*: the habeas judge here, the CCA ruled, had "erred by disregarding our case law and employing the definition of intellectual disability presently used by the AAIDD, a definition which notably omits the requirement that an individual's adaptive behavior deficits, if any, must be 'related to' significantly sub-average general intellectual functioning." Pet. App. 6a.

Even *within the State's criminal justice system*, Texas' death penalty system is an outlier. In Texas' juvenile justice system, the State recognizes that certain young offenders may have "specialized treatment needs." 37 Tex. Admin. Code §380.8751(a). One of those identified needs is intellectual disability: Texas operates a "residential treatment program" that "provides specialized program services for youth identified with a high need for intellectual disability services." 37 Tex. Admin. Code §380.8775(a). For *this* criminal justice purpose, Texas requires a diagnosis made by "a psychology and psychiatry staff based on the results of a culturally validated assessment of cognitive functioning, mental abilities, reasoning, problem solving, abstract thinking, and adaptive be-

havior *as defined in the latest edition of the DSM*." 37 Tex. Admin. Code §380.8751(e)(3) (emphasis added).[2] But when it comes to deciding whether a person is to be executed, the decision below mandates adherence to the outdated, non-clinical, Texas-specific *Briseno* framework.

It is difficult to imagine a rational justification for this difference in treatment. That is especially so given the similar penological objectives at work. Texas offers special treatment to juvenile offenders with intellectual disability to promote "successful ... reentry" and "reduce risk to the community by addressing individual specialized treatment needs through programs that are shown to reduce risk to reoffend." 37 Tex. Admin. Code §380.8751(a). Texas recognizes, in other words, that intellectually disabled offenders may require particular attention to reduce re-offense risk, above and beyond the ordinary deterrence of the criminal law. That neatly tracks one of *Atkins*' primary justifications for excluding the intellectually disabled from the death penalty: executing such individuals "will not measurably further the goal of deterrence" because of such offenders' "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," which "make it less likely that they

---

[2] This mirrors Texas' general approach to "mental health assessment" for juveniles, which is similarly required to be made "using the most current edition of the Diagnostic and Statistical Manual of Mental Disorders." 37 Tex. Admin. Code §380.8751(e)(2). Similarly, when diagnosing alcohol- and drug-treatment issues, Texas requires the use of the most up-to-date standards. 37 Tex. Admin. Code §380.8751(e)(6).

can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." 536 U.S., at 320.

Texas' decision to use the *Briseno* factors *only* in its administration of the death penalty, while reserving clinical judgment for decisions about schooling and juvenile justice, turns on its head the usual requirement of a "*greater* degree of reliability when the death sentence is imposed." *Lockett*, 438 U.S. at 604 (emphasis added). In *Lockett*, this Court observed that most States had an "established practice of individualized sentences" in non-capital cases, and that the "considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases." *Id.*, at 605.

The same logic applies here: whatever the considerations that require the use of up-to-date medical standards in schooling decisions or the juvenile justice system "surely cannot be thought less important" when a person's life is at stake. See also *Eddings v. Oklahoma*, 455 U.S. 104, 117–18 (1982) (O'Connor, J., concurring) (noting that death sentences are "qualitatively different" and therefore require "extraordinary measures" to protect the rights of defendants). But that is just what the current system in Texas suggests.

* * *

Blackstone stated that "ancient Saxon law" had provided that a child under twelve could not be "guilty in will" of a capital crime—but noted that un-

der the law "as it now stands, and has stood at least ever since the time of Edward the third," the "capacity of doing ill ... is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1765). Blackstone's conception of intellectual disability (which was restricted to a group he called "idiots") was, thankfully, not the terminus of our society's understanding—but even then, it was understood that the understanding of such matters evolves over time.

Blackstone thought it inappropriate to freeze the Saxon practice in place as our law's unyielding yardstick of intellectual disability. But neither did our society's understanding of intellectual disability end in 2002, when this Court decided *Atkins*. Texas, however, requires that its courts ignore the modern professional understanding of intellectual disability in *Atkins* cases, and instead apply the wholly non-clinical *Briseno* factors; in that, it stands alone. Because the Eighth Amendment means the same thing in every State, the judgment below should undoubtedly be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

VIRGINIA E. SLOAN
SARAH TURBERVILLE
THE CONSTITUTION
PROJECT
1200 18th Street, N.W.
Suite 1000
Washington, DC 20036

MEIR FEDER
Counsel of Record
IAN SAMUEL
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939
mfeder@jonesday.com

August 4, 2016

Counsel for Amici Curiae

APPENDIX

Members of the Constitution Project's
Death Penalty Committee

Co-Chairs

Gerald Kogan
Chief Justice, Florida Supreme Court, 1987-1998; Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida, 1960-1967

Mark White
Governor, Texas, 1983-1987; Attorney General, Texas, 1979-1983; Secretary of State, Texas, 1973-1977; Assistant Attorney General, Texas, 1965-1969

Beth A. Wilkinson
Special Attorney to the U.S. Attorney General, Oklahoma City bombing case, 1995-2001; Assistant U.S. Attorney, Eastern District of New York, 1991-1995

Members

David I. Bruck
Clinical Professor of Law and Director, Virginia Capital Case Clearinghouse, Washington and Lee University School of Law; Federal Death Penalty Resource Counsel

William G. Broaddus
Attorney General, Virginia, 1985-1986

W.J. Michael Cody
Attorney General, Tennessee, 1998-2001

Mark Earley, Sr.
Attorney General, Virginia, 1998-2001; Senator, Virginia State Senate 1988-1998

O.H. Eaton, Jr.
Judge, Florida 18th Judicial Circuit, 1986-2010

John J. Gibbons
Director and Founder, John J. Gibbons Fellowship in Public Interest and Constitutional Law; Chief Judge, United States Court of Appeals, Third Circuit, 1987-1990

Charles A. Gruber
Chief of Police, South Barrington Police Department, 1999-2008; President, International Association of Chiefs of Police, 1990; President, Illinois Association of Chiefs of Police, 1982

Dr. David P. Gushee
Distinguished University Professor of Christian Ethics and Director, Center for Theology and Public Life, Mercer University

Sam D. Millsap, Jr.
District Attorney, Bexar County, Texas, 1983-1987

Sheila M. Murphy
President, Board of Directors, Illinois Death Penalty Education Project; Presiding Judge, Illinois Sixth District, 1992-1999

Chase Riveland
Secretary, Department of Corrections, Washington, 1986-1997; Executive Director, Colorado Department of Corrections, 1983-1986; Deputy Director, Wisconsin Division of Corrections, 1980-1982; Superintendent, Portage Correctional Institution, Wisconsin, 1980-1982

David A. Schwartz
President & CEO, DS Baseball LLC

William S. Sessions
Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court, Western District of Texas, 1974-1987; Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974

B. Frank Stokes, Jr.
Private Investigator; Special Agent, Federal Bureau of Investigation, 1971-2001

Jennifer Thompson-Cannino
Author, activist; Member, North Carolina Innocence Commission; Member, Advisory Committee for Active Voices

Scott Turow
Author; Member, Illinois' Executive Ethics Commission; Assistant U.S. Attorney, Northern District of Illinois, 1979-1986; Chair, Illinois State Appellate Defender's Commission, 2002-2004

John W. Whitehead
President, The Rutherford Institute

Dr. Reginald Wilkinson
Director, Ohio Department of Rehabilitation and Correction (DRC), 1991-2006; DRC employee, 1973; President, American Correctional Association; Vice Chair for North America, International Corrections and Prison Association; President, Ohio Correctional and Court Services Association; Founder, Ohio chapter, National Association of Blacks in Criminal Justice

Michael Wolff
Dean, Saint Louis University School of Law; Judge, Supreme Court of Missouri, 1998-2011; Chief Justice, 2005-2007

Rev. Dr. Aidsand F Wright-Riggins III
Executive Director, American Baptist Home Mission Societies, American Baptist Churches, USA

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 13 2016
OFFICE OF THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
KYMBERLEE STAPLETON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

Does *Atkins* v. *Virginia* delegate to unaccountable private organizations the power to redefine the content of the Eighth Amendment rule identified in *Atkins*, rendering unconstitutional state laws (either statutory or case law) that comply with the scope of the *Atkins* rule as initially announced?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 7

I

No other mental issue in the criminal law is controlled by a definition from clinical practice, and there is no reason the *Atkins* issue should be 7

II

Categorical exemptions are contrary to the principle of individualized capital sentencing and should be narrowly construed 10

III

Giving legal force to definitions by private organizations distorts the definition-making process 14

IV

The APA's and AAIDD's revised definitions are social and policy documents, not unanimous and not science as generally understood 17

A. The controversial DSM-5 18

B. Intellectual disability as a social construct 21

Conclusion 24

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U. S. 304 (2002) 3, 10, 12

Bobby v. Bies, 556 U. S. 825 (2009) 14

Bobby v. Van Hook, 558 U. S. 4 (2009) 17

Clark v. Arizona, 548 U. S. 735 (2006) 8

Drope v. Missouri, 420 U. S. 162 (1975) 7

Ex parte Briseno, 135 S. W. 3d 1
(Tex. Crim. App. 2004) 3, 4

Ex parte Moore, 470 S. W. 3d 481
(Tex. Crim. App. 2015) 3, 4, 5

Ford v. Wainwright, 477 U. S. 399 (1986) 9

Hall v. Florida, 134 S. Ct. 1986 (2014) 10

Indiana v. Edwards, 554 U. S. 164 (2008) 8, 15

Jennings v. Stephens, 135 S. Ct. 793 (2015) 15

Kennedy v. Louisiana, 554 U. S. 407 (2008) 10

Kimble v. Marvel Entertainment, LLC,
135 S. Ct. 2401 (2015) 4

Leland v. Oregon, 343 U. S. 790 (1952) 8

Marks v. United States, 430 U. S. 188 (1977) 12

Miller-El v. Dretke, 545 U. S. 231 (2005) 15

Moore v. Johnson, 194 F. 3d 586 (CA5 1999) 2

Moore v. State, 700 S. W. 2d 193 (Tex. Crim. App. 1985) 2

Panetti v. Quarterman, 551 U. S. 930 (2007) 8, 9

Papachristou v. City of Jacksonville, 405 U. S. 156 (1972) 4

Penry v. Lynaugh, 492 U. S. 302 (1989) 3, 11, 12

Penry v. State, 903 S. W. 2d 715 (Tex. Crim. App. 1995) 12

Powers v. Ohio, 499 U. S. 400 (1991) 15

Roper v. Simmons, 543 U. S. 551 (2005) 10

Sumner v. Shuman, 483 U. S. 66 (1987) 11

Woodson v. North Carolina, 428 U. S. 280 (1976) 11

State Statute

Tex. Code Crim. Proc., Art. 11.071 3

Secondary Authorities

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) 7, 18

Baumeister, Mental Retardation: Confusing Sentiment with Science, in H. Switzky & S. Greenspan, eds., What Is Mental Retardation? Ideas for an Evolving Disability in the 21st Century (rev. ed. 2006)) 23

Covarrubias, Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants, 11 Scholar: St. Mary's Law Review on Minority Issues 413 (2009) 13

Detterman & Gabriel, Look before You Leap: Implications of the 1992 and 2002 Definitions of Mental Retardation, in H. Switzky & S. Greenspan, eds., What Is Mental Retardation? Ideas for an Evolving Disability in the 21st Century (rev. ed. 2006) 20, 23

Frances, DSM-5 Is a Guide, Not a Bible: Simply Ignore Its 10 Worst Changes, available at http://www.huffingtonpost.com/allen-frances/dsm-5_b_2227626.html (Dec. 3, 2012) (as visited September 8, 2016) 18, 20

Greenspan & Switzky, Lessons from the *Atkins* Decision for the AAMR Manual, in H. Switzky & S. Greenspan, eds., What Is Mental Retardation? Ideas for an Evolving Disability in the 21st Century (rev. ed. 2006) 16

Greenspan, Mental Retardation in the Real World: Why the AAMR Definition Is Not There Yet, in H. Switzky & S. Greenspan, eds., What Is Mental Retardation? Ideas for an Evolving Disability in the 21st Century (rev. ed. 2006) 22

MacMillan, Siperstein, & Leffert, Children with Mild Mental Retardation: A Challenge for Classification Practices—Revised, in H. Switzky & S. Greenspan, eds., What Is Mental Retardation? Ideas for an

Evolving Disability in the 21st Century (rev. ed. 2006) 23

Mossman, *Atkins v. Virginia*, A Psychiatric Can of Worms, 33 N. M. L. Rev. 255 (2003) 12, 22

Switzky, H., & Greenspan, S., eds., What Is Mental Retardation? Ideas for an Evolving Disability in the 21st Century (rev. ed. 2006) 16

Wakefield, DSM-5, Psychiatric Epidemiology and the False Positives Problem, 24 Epidemiology and Psychiatric Science 188 (2015) 18, 19

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves an attempt to overturn a judgment that became final on direct appeal over 12

---

1. Both parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

years ago by claiming that the state must change the standard it uses to determine whether a murderer is intellectually disabled in order to keep up with current fashion. Such a constitutional moving target would further obstruct the already obstructed path of justice in cases of capital murder. No showing has been made that such continual revision is needed to exclude the class of persons for whom *Atkins* v. *Virginia* found a national consensus to exist. This obstruction of justice is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Prior to the crime in this case, petitioner Bobby James Moore had already committed numerous crimes. He had three prior convictions for burglary and one for aggravated robbery. *Moore* v. *Johnson*, 194 F. 3d 586, 598 (CA5 1999). In addition, he was positively identified at his first trial of having committed robberies of two other small grocery stores in the weeks prior to the crime in this case. *Ibid.*

On April 25, 1980, Moore and two accomplices attempted to rob the Birdsall Super Market in Houston, Texas. *Moore* v. *State*, 700 S. W. 2d 193, 195 (Tex. Crim. App. 1985). James McCarble, 72, a longtime employee of the store, was working there among others. Edna Scott, another employee, shouted that the store was being robbed and dropped to the floor. Then she heard a noise, and McCarble fell on the floor right beside her. She "observed that 'Jim's head [had been shot] off.' " *Id.*, at 195-196.

Moore was convicted and sentenced to death, and the Court of Criminal Appeals affirmed. *Id.*, at 207. Habeas corpus proceedings eventually ended with a grant of relief for ineffective assistance of counsel as to penalty only. See *Moore* v. *Johnson*, 194 F. 3d, at 622.

In the course of his habeas corpus proceedings, Moore presented the testimony of Dr. Robert Borda. Dr. Borda did not diagnose Moore as intellectually disabled. See *Ex parte Moore*, 470 S. W. 3d 481, 495 (Tex. Crim. App. 2015).

In 2001, the year before *Atkins* v. *Virginia*, 536 U. S. 304 (2002), but long after *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), a new sentencing hearing was conducted. Under *Penry*, the defendant had the right to have retardation (as the condition was then known) considered in mitigation, but Moore did not claim he was retarded. Instead, he presented the testimony of social worker Bettina Wright, who "concluded that [Moore] 'was nowhere near retarded.' "[2] *Ex parte Moore*, 470 S. W. 3d, at 503. Moore was again sentenced to death. *Id.*, at 484. The Texas Court of Criminal Appeals affirmed in an unpublished decision.

The present habeas corpus proceeding was filed under Article 11.071 of the Texas Code of Criminal Procedure. Under that statute, the application is filed in the convicting court but the writ is returnable in the Court of Criminal Appeals. *Id.*, § 4(a). When an evidentiary hearing is warranted, the convicting court holds a hearing, *id.*, § 9(a), and transmits to the Court of Criminal Appeals, among other things, its findings of fact and conclusions of law. *Id.*, § 9(f)(1)(F). The Court of Criminal Appeals can adopt these findings, but it remains "the ultimate factfinder in [the] case." *Ex parte Moore*, 470 S. W. 3d, at 489.

The Court of Criminal Appeals restated its test for intellectual disability. See *id.*, at 513-514 (citing, *inter alia*, *Ex parte Briseno*, 135 S. W. 3d 1, 7 (Tex. Crim.

---

2. A rule that a defendant is estopped from making an *Atkins* claim in these circumstances would be proper, but Texas does not assert such a rule.

App. 2004)). *Briseno* adopted the then-current AAMR definition, or alternatively the Texas Health and Safety Code codification of it for the purpose of mental health services, with a reference to the then-current DSM-IV for the definition of "significantly subaverage intellectual functioning." *Briseno*, at 7, and n. 24.[3]

Applying this long-established three-part test, the court found that Moore had not established that he is intellectually disabled. Among the various intelligence tests administered, the court appropriately gave the greatest weight to the Wechsler scales (WISC for children; WAIS for adults), a preference thoroughly supported by expert opinion and the academic literature. The court discounted one of the three, however, the one administered in preparation for the present case, based on expert testimony of malingering. See *Ex parte Moore*, 470 S. W. 3d, at 518-519. Considering the two best scores and taking into account the standard error of measurement,[4] the court found that the petitioner's "intellectual functioning [is] above the intellectually disabled range."

---

3. The "urban legend" that the standard is based on literature rather than science merely because of a passing reference in the introductory discussion of the opinion, see *id.*, at 6, is preposterous. It would be a sad day for judicial writing if a precedent could be discredited merely because the author spiced it up with a literary or cultural reference. Is *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2415 (2015), "based on" a comic book? Is *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 164 (1972), "based on" a poem?

4. Even when the lower tail of the two-sigma interval dips barely below 70, that represents only a very small probability that the true IQ is below 70. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Hall* v. *Florida*, No. 12-10882, pp. 13-16, available at http://cjlf.org/program/briefs/HallF.pdf.

While this finding alone would be sufficient to preclude intellectual disability under the conjunctive test, the court went on to consider the testimony on adaptive behavior. The state's expert testified that Moore's "level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis." *Id.*, at 526. The court found her opinion to be "far more credible and reliable than those of applicant's experts." *Id.*, at 524. On these facts, the court found that Moore was not entitled to relief. *Id.*, at 527-528.

SUMMARY OF ARGUMENT

No other mental issue in the criminal law is controlled by clinical definitions which may be changed from time to time by private organizations. Competency to stand trial, competency to exercise the right of self-representation, competency for execution, and being not guilty by reason of insanity are all based on standards established in law and not dependent on whether the defendant fits the criteria for any specific mental diagnosis. *Atkins* v. *Virginia* is based on a national consensus which is not necessarily congruent with the ever-expanding scope of intellectual disability as defined by private organizations.

Individualized sentencing procedures in which the sentencer can weigh aggravating and mitigating circumstances, as they exist for the particular offense or particular offender, is the cornerstone of this Court's modern capital punishment jurisprudence. Categorical exemptions from punishment based on the characteristics of the offender run contrary to this principle, effectively requiring that the typical characteristics of a class of persons be deemed to necessarily outweigh all aggravating circumstances, even though the individual

defendant may be far from typical. Given this tension, categorical exemptions should be narrowly construed and applied only where the justifications for them are strongest. The rationale of *Atkins* is at its weakest in borderline cases where a person may be considered intellectually disabled or not depending on which of the multiple definitions is used. States should, at a minimum, be allowed to choose among these definitions.

Giving legal force to definitions established by private organizations distorts the definition-making process. These organizations have an interest in influencing the outcome of cases, and giving their definitions controlling force provides an incentive for them to write expansive definitions.

The APA's and AAIDD's revised definitions are social and policy documents. They do not represent unanimous opinion in the profession, and they are not based on science as that term is generally understood. The DSM-5 has been severely criticized within the psychiatric profession for the secretive and unscientific manner in which it was created, for expanding the scope of what is considered mental illness, and for promoting "false positives," diagnosis of people who are not really ill. The AAIDD's own publications demonstrate conclusively that there is nothing close to unanimity on the definition of intellectual disability. They also indicated that policy considerations, including expanding the class of people who will be exempt under *Atkins*, enter into the consideration.

ARGUMENT

I. No other mental issue in the criminal law is controlled by a definition from clinical practice, and there is no reason the *Atkins* issue should be.

Petitioner in this case misstates the issue presented as whether a state court can "prohibit the use of current medical standards on intellectual disability." The position he actually asserts to this Court is that the state court is obligated to use clinical definitions recently adopted by private organizations as the standard by which it decides the legal question of whether a murderer is exempt from capital punishment by reason of intellectual disability. In *no* other area of criminal law where a mental excuse or exemption is claimed is such a clinical definition deemed controlling.

We can begin with competency to stand trial.

> "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975).

Where in the DSM-5[5] or its predecessors does one find this diagnosis? Nowhere. It is not a diagnosis. The legal system is concerned with the effects of the defendant's mental condition on its obligation to provide a fair trial, while psychiatric diagnosis is concerned with providing appropriate treatment and

---

5. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

supportive services. Given these different purposes, it is not surprising that different criteria are applied.

A different rule applies to the competence of the defendant to conduct his own defense. "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana* v. *Edwards*, 554 U. S. 164, 178 (2008). The *Edwards* Court considered the input of the American Psychiatric Association (APA) to the effect that " 'symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation,' " *id.*, at 176 (quoting APA brief), but again it did not adopt any clinical definition of an illness as the standard.

Moving from procedure to substance, *Clark* v. *Arizona*, 548 U. S. 735, 749 (2006), upheld a definition of the insanity defense that was even more restrictive than the much-criticized *M'Naghten* test dating back to Victorian England. The Court noted, "medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement." *Id.*, at 752. *Clark* cited with approval *Leland* v. *Oregon*, 343 U. S. 790, 801 (1952), which held that the "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility."

Finally, in *Panetti* v. *Quarterman*, 551 U. S. 930, 955 (2007), the question was not whether Panetti met the diagnostic criteria for a psychotic disorder, whether schizophrenia, schizoaffective disorder, or anything else. He clearly was psychotic. "The legal inquiry

concerns whether these delusions can be said to render him incompetent." *Id.*, at 956.[6] Neither of the competing standards from *Ford* v. *Wainwright*, 477 U. S. 399 (1986), is framed in terms of a clinical diagnosis. See *Panetti*, at 948-949, 958-959. Although *Panetti* does not establish a standard, *id.*, at 960-961, it is clear from the opinion that no psychiatric diagnosis constitutes the standard. A psychotic disorder is "[t]he beginning of doubt about competence," *id.*, at 960, not the final conclusion of incompetence.

All of these cases indicate that a mental defense should not be tightly bound to a clinical definition, but *Clark* appears to present the closest parallel to the present case as it involves a substantive question going to the propriety of the judgment as opposed to competence to go forward with a particular portion of the proceedings. There has long been a national consensus that a person who is insane should not be convicted of an offense, but there is also substantial and long-standing disagreement on how to define that category. Similarly, this Court has found that there is now a national consensus against executing persons with intellectual disability, regardless of the circumstances of the crime, but has acknowledged the widespread disagreement on how to define that category.

The answer is to allow the states the same latitude on this question that they have on the insanity question. Convicting an innocent person of murder is a vastly greater injustice than the execution of any guilty

---

6. The great irony of this case is that Panetti was probably sentenced to death because of an overly expansive view of his constitutional rights. If he had been tried after *Indiana* v. *Edwards*, *supra*, he would have had trial counsel who could have presented his mental illness properly to the jury.

murderer, and there is no reason for the states to have any less latitude on sentencing than they have on guilt.

The *Atkins* rule will not be nullified by allowing the states such latitude so long as this Court retains the ability to rein in radical departures from the national consensus or clearly erroneous misuses of assessment instruments.[7] At a minimum, the states should have the ability to choose among any of the definitions that have seen broad acceptance from the time of *Atkins* to the present.

II. Categorical exemptions are contrary to the principle of individualized capital sentencing and should be narrowly construed.

Atkins v. *Virginia*, 536 U. S. 304 (2002), is one of two precedents of this Court establishing a categorical exemption based on the personal characteristics of the murderer regardless of the circumstances of the crime.[8] The other is *Roper* v. *Simmons*, 543 U. S. 551 (2005), exempting all murderers a day or more short of their 18th birthdays at the time of the crime. In effect, *Atkins* and *Roper* require that a single mitigating circumstance be deemed to necessarily outweigh any and all aggravating circumstances that may be present without any individualized consideration of the circumstances of the particular offense or of any other characteristics of the offender, such as criminal record.

---

7. The failure to consider the standard error of measurement in *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), is an example of the latter.

8. Categorical exclusions for offenses rather than offenders, see, *e.g.*, *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008), are distinguishable and need not be considered here.

For four decades now, this Court has insisted that individualized sentencing is a constitutional imperative in capital cases. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (lead opinion). States have been constitutionally forbidden from identifying a single factor and deciding in advance that the presence of this factor requires a death sentence without that individualized consideration. Even in the exceptionally compelling circumstance of a life-sentenced murderer who kills again within prison, the Court insisted that the Constitution requires consideration of the individual circumstances of the particular case. See *Sumner* v. *Shuman*, 483 U. S. 66, 80-82 (1987).

A categorical exemption from the death penalty based on a single characteristic suffers the same flaw as a mandatory death penalty. "It treats all persons [classified within a given category] not as uniquely individual human beings, but as members of a faceless, undifferentiated mass . . . ." Cf. *Woodson*, 428 U. S., at 304.

In *Penry* v. *Lynaugh*, 492 U. S. 302, 322-323 (1989), this Court recognized that mental retardation was a powerful mitigating factor with regard to a defendant's culpability, and it deserved to be weighed in the balance with the other factors. Giving it conclusive weight by itself, however, was not warranted, in part because of the wide variations in abilities among persons who might qualify for the "retarded" label.

> " 'The term *mental retardation*, as commonly used today, embraces a heterogeneous population, ranging from totally dependent to nearly independent people. Although all individuals so designated share the common attributes of low intelligence and inadequacies in adaptive behavior, there are marked variations in the degree of deficit manifested and the presence or absence of associated physical handi-

> caps, stigmata, and psychologically disordered states.'" *Id.*, at 338 (opinion of O'Connor, J.) (quoting AAMR Manual).[9]

Both holdings were consistent with the theme of individualized sentencing that has been a central pillar of this Court's capital sentencing jurisprudence from *Woodson* forward.

In *Atkins*, the Court changed course, in part by accepting as if universally true of all intellectually disabled persons the sweeping generalities rejected in *Penry*. See 536 U. S., at 318-321. The *Atkins* opinion notwithstanding, it surely is not true that *all* persons diagnosable as intellectually disabled *always* act on impulse rather than premeditation, *always* follow others rather than lead or act alone, and are *necessarily* so cognitively deficient as to be undeterrable. See Mossman, *Atkins v. Virginia*: A Psychiatric Can of Worms, 33 N. M. L. Rev. 255, 273 (2003).

Atkins says that persons with intellectual disability "by definition . . . have diminished capacities . . . to abstract from mistakes and learn from experience, [and] to engage in logical reasoning . . . ." 536 U. S., at 318. Yet Penry clearly learned from experience and could reason logically. From his previous rape conviction, see *Penry* v. *State*, 903 S. W. 2d 715, 761 (Tex. Crim. App. 1995), he learned that leaving a rape victim alive would result in getting caught, so he logically went to Pamela Carpenter's house with the premeditated design to kill her after he raped her. See *id.*, at 755.

In essence, the *Atkins* Court engaged in the same kind of sweeping generality in disregard of the facts of

---

9. Part IV-C of the opinion is not the opinion of the Court, but it is the opinion concurring in the judgment on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

individual cases that this Court forbade the states to employ in *Sumner*.

To the extent that *Atkins* rests on a generalized characterization of persons with intellectual disability, those sweeping assumptions are at their weakest in the very cases at issue here: the ones near the borderline of qualification for the diagnosis such that a defendant might qualify under one definition but not another. To the extent that *Atkins* rests on a consensus of the American people that persons with intellectual disability should never be executed regardless of their crimes, that finding of consensus is extremely doubtful as applied to persons at the borderline that most laymen would not recognize as intellectually disabled. See Covarrubias, Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants, 11 Scholar: St. Mary's Law Review on Minority Issues 413, 440 (2009) (noting most laypersons think of retarded persons as far more disabled than the mildly retarded actually are).

Finally, it is important to bear in mind that a finding that a person does not qualify for the categorical exemption of *Atkins* does not mean that person will necessarily be sentenced to death. The procedural part of *Penry* is still the law, and capital defendants are still entitled to its protection. Before a murderer can be sentenced to death, he is entitled to a weighing by the sentencer of the aggravating and mitigating facts of his individual case, and his actual mental impairment is a powerful factor in that determination. In such a proceeding, the question of whether an impaired defendant falls slightly on one side or the other of the retardation line is immaterial. Between *Penry* and *Atkins*, such defendants were sometimes referred to as "retarded" by courts properly weighing their impair-

ments without concern for precise line-drawing. See, *e.g.*, *Bobby* v. *Bies*, 556 U. S. 825, 828 (2009).

The only consequence of a negative *Atkins* finding is that the defendant receives an individualized determination of whether his impairment plus any other mitigation does or does not outweigh the aggravating circumstances of his offense and prior offenses, rather than an outcome mechanically determined by a single factor, ignoring all others. This is not a result that calls for going to extraordinary lengths to avoid, particularly in a borderline case where the rationale for the *Atkins* rule is weakest. On the contrary, this is the path that is most likely to lead to a just result in the case.

With unbiased justice as the goal, it makes perfect sense to reserve the rule of *Atkins* for cases where it clearly applies and let the doubtful cases go to individualized sentencing with consideration of all the circumstances. As a constitutional mandate, *Atkins* should not be expanded beyond its original scope. If states want to extend the exemption into new territory by statute, they are, of course, free to do so, but this Court should not force the states to march in lockstep, especially not to the drumbeat of private organizations with an agenda to block as many death sentences as they can.

III. Giving legal force to definitions by private organizations distorts the definition-making process.

Petitioner and his supporting *amici*, including the American Psychiatric Association (APA) and the American Association on Intellectual and Developmental Disabilities (AAIDD), would have this Court believe that the new APA and AAIDD definitions are works of neutral, objective science. They are not, for the reasons explained in the Brief of Respondent and in Part IV of

this brief, *infra*. A related and very important concern is that giving legal effect to psychological definitions produced by private organizations may itself cause a distortion in the process of making these definitions, causing them to be different from the definition that would be established if it had no such effect.

The APA and the AAIDD once again appear in this case as *amici curiae* supporting the criminal defendant. They also supported the defendants in *Atkins* v. *Virginia* and in *Hall* v. *Florida*. To the best of *amicus* CJLF's knowledge based on a Lexis search, neither organization has ever filed an *amicus* brief in this Court in support of the prosecution. Even in *Indiana* v. *Edwards*, 554 U. S. 164 (2008), a highly unusual case where the APA might have been expected to support the prosecution, its brief was filed in support of neither party. Such a pattern establishes a powerful prima facie case of bias. Cf. *Miller-El* v. *Dretke*, 545 U. S. 231, 240-241 (2005).[10] When an organization leans in favor of criminal defendants generally, those leanings tend to be particularly strong in capital cases. If either of these organizations could reduce the number of capital sentences by making its definition of intellectual disability more expansive, could that incentive corrupt the final product?

In 2006, *amicus* AAIDD, then known as the American Association on Mental Retardation, was in the process of reconsidering its definition, and it published a book with a variety of perspectives from "a rare collection of leading thinkers in the MR [mental retar-

---

10. CJLF also files almost entirely on one side, with *Powers* v. *Ohio*, 499 U. S. 400 (1991) (supporting defendant) and *Jennings* v. *Stephens*, 135 S. Ct. 793 (2015) (supporting neither party), being the exceptions. The difference is that we are candidly advocates for a cause and make no pretense otherwise.

dation] field." H. Switzky & S. Greenspan, eds., What Is Mental Retardation? Ideas for an Evolving Disability in the 21st Century xxiii (rev. ed. 2006).[11] While none of the chapters constitutes an official position of the organization, we can fairly assume that all the views stated are regarded by AAIDD as within the realm of reasonable disagreement among experts. We can also assume that the editors of the book are regarded by the organization as mainstream and not fringe thinkers in the field. This book provides a valuable insight into what really was involved in crafting the new definition, in contrast to the objective scientific process that the "topside" briefs in this case would have the Court believe.

The chapter that specifically addresses *Atkins* was written by the editors of the book, one of whom was an expert witness for the petitioner in this case. These authors advocate raising the IQ ceiling dramatically or abolishing it altogether, basing the diagnosis within the expanded or unlimited range solely on adaptive deficits and the developmental period criterion, and expanding "mild MR" to include the relatively large section of the population that would previously have been classified as "borderline" and not retarded as defined in *Atkins*. See Greenspan & Switzky, Lessons from the *Atkins* Decision for the AAMR Manual, in WIMR at 298.

The authors are candid about their motive. Their proposed solution is motivated in part by a desire to expand the number of people who would come within the categorical exclusion of *Atkins*. See *ibid*. These are people who, in the authors' opinion, are "deserving of protection," see *id*., at 298-299, but that does not mean

---

11. This book is cited below as "WIMR." The subtitle alone is a strong argument against adopting the definition *de jour* as a constitutional mandate.

that they are within the national consensus that is the basis of *Atkins*.

This is a confession of political corruption of the definition process. The authors chosen by AAIDD to edit their book openly advocate revising the definition in order to change the law to conform to their own views of policy.

How can this Court depend on an organization's definitions and standards to inform its view of a scientific issue when the very act of depending on them may cause the organization to change them?[12] It would be folly to depend on them under these circumstances. It is one thing to say that courts can and should consider the views of professional organizations and quite another to delegate the definition of constitutional requirements to unelected and unaccountable private organizations with their own agenda. See *Bobby* v. *Van Hook*, 558 U. S. 4, 8 (2009). Judicial consideration of the APA and AAIDD positions should be conducted with a skeptical eye and a keen awareness that these organizations have policy agendas that influence their pronouncements.

IV. The APA's and AAIDD's revised definitions are social and policy documents, not unanimous and not science as generally understood.

Amici APA, *et al.*, represent to this Court that "there is unanimous professional consensus on the criteria applied to diagnose intellectual disability."

---

12. There is a somewhat analogous problem in physics. At the subatomic level, the very act of observing something changes what one is observing. This conundrum underlies the Heisenberg Uncertainty Principle.

Brief for American Psychological Association, *et al.*, as *Amici Curiae* 7 (capitalization omitted).[13] This statement is demonstrably false. The APA Brief also treats the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-5") as if it were the definitive and universally accepted word of the mental health professions. Actually, that book is highly controversial and hotly disputed.

A. The Controversial DSM-5.

To say that the DSM-5 is controversial is an understatement. Professor Allen Frances of Duke University, chair of the DSM-IV revision, called the day of its final approval "the saddest moment in my 45 year career of studying, practicing, and teaching psychiatry." Frances, DSM-5 Is a Guide, Not a Bible: Simply Ignore Its 10 Worst Changes, available at http://www.huffingtonpost.com/allen-frances/dsm-5_b_2227626.html (Dec. 3, 2012) (as visited September 8, 2016). He called the new edition "a deeply flawed DSM-5 containing many changes that seem clearly unsafe and scientifically unsound," and he advised against "follow[ing] DSM-5 blindly down a road likely to lead to massive over-diagnosis and harmful over-medication." *Ibid.*

Professor Frances was by no means alone in this opinion. Professor J. C. Wakefield of New York University noted that the new edition "has been criticized for its revision process, goals and content." Wakefield, DSM-5, Psychiatric Epidemiology and the False Po-

---

13. In this brief, we use "APA" standing alone to refer to the American Psychiatric Association, which is among the "*et al.*" on the brief listing the American Psychological Association first. We refer to that brief as the "APA Brief."

sitives Problem, 24 Epidemiology and Psychiatric Science 188, 188 (2015). The process described by Professor Wakefield, including secrecy and lack of documentation, should make courts very reluctant to rely on anything the DSM-5 says.

> "Most egregiously, the deliberations of the DSM-5 Scientific Review Committee, formed in response to the DSM-5 controversies to evaluate the strength of the scientific evidence for each proposed change and provide recommendations to the workgroups, are being kept strictly secret." *Id.*, at 189.

Incredibly for an organization that purports to be scientific, the APA required workgroup members to sign confidentiality agreements that limited their ability to speak in public about the changes. See *ibid.* "The needlessly secretive DSM-5 mindset [is] antithetical to both the appearance and reality of intellectual integrity . . . ." Not only does this mindset "short-change[] future scholarship," *ibid.*, but it severely undercuts the trust that courts can place in the product.

Even worse than the process is the "false positives problem." There are two kinds of errors in research and diagnosis. A "false positive" is finding something that does not actually exist, and a "false negative" is failing to find something that does exist.

> "The most vehement and sustained objections [to DSM-5] were aimed at the content of its diagnostic criteria. It was argued that the revised criteria illegitimately expanded psychiatric diagnosis into areas of normal-range distress and other problems in living, undermining the integrity of psychiatry as a medical discipline, obscuring the meaning of its research results and potentially leading to unwarranted and possibly harmful treatment." *Id.*, at 188.

"Many millions of people with normal grief, gluttony, distractibility, worries, reactions to stress, the temper tantrums of childhood, the forgetting of old age, and 'behavioral addictions' will soon be mislabeled as psychiatrically sick and given inappropriate treatment." Frances, *supra*.

If present trends continue, by DSM-8 we will all be mentally ill.

Specifically for developmental disabilities, the problem of false positives is greatly aggravated by the de-emphasis of the more objective intelligence testing and greater reliance on the more malleable and informant-dependent adaptive functioning. It is for this reason that two of the experts in AAIDD's book, writing from the perspective of researchers rather than service providers (or expert witnesses for defendants), recommended doing away with the adaptive skills element altogether and relying solely on intelligence testing.

> "First, the instruments designed to measure adaptive skills are simply not adequate. When the concept of adaptive behavior was first introduced to the definition in the 1960s [citation], it was criticized because measures of adaptive behavior were not well-standardized. Often, clinical judgment was substituted for a formal assessment of adaptive behavior. There tended to be low agreement between examiners when diagnosing impairment in adaptive behavior. Clinical judgment led to low agreement between examiners, and low agreement resulted in unreliable diagnosis [citation]." Detterman & Gabriel, Look before You Leap: Implications of the 1992 and 2002 Definitions of Mental Retardation, in WIMR 135, 138.

The APA may be unconcerned with false positives in this area. No concern is evident from its brief. This

Court, however, should be very concerned. A categorical exclusion from punishment is a drastic action, removing from the people of the state the sovereign authority they have always possessed to decide which murderers will be punished with death and which will not. A false positive wrongly removes the case from the normal weighing process and exempts a murderer from the punishment he may very well richly deserve. A false negative, on the other hand, merely remands the case to the normal weighing process where the defendant has the right under *Penry* and its progeny to present his impairment as mitigating to the jury and have them instructed to consider it, if he chooses to do so.

The traditional three-part test from the DSM-IV, with intellectual functioning two standard deviations below the mean as a conjunctive requirement with limitations in adaptive functioning, has important value in limiting the false positive problem. IQ testing is far more objective than adaptive functioning scales. Testing is done by objective examiners, while adaptive functioning depends on reports from people who know the defendant, who will very often be his family and friends and who may have been coached on their responses. States should not be forced to abandon this standard, which is written into their statutes in many states, on the say-so of a document which has been fiercely criticized within its profession for escalating the false positive problem.

B. Intellectual Disability as a Social Construct.

Binding the constitutional rule of *Atkins* to the frequently changing clinical definitions of intellectual disability would be particularly inappropriate because this diagnosis is different from a typical medical diagnosis and even from many psychiatric ones. For most

disorders, health professions have a keen interest in scientifically precise and accurate diagnosis because it is essential to providing the patient with safe and effective treatment. If a disease is caused by an infecting microbe, a physician must know which one in order to prescribe a medication that actually attacks that microbe. A psychiatrist must accurately diagnose mental disorders to know whether to prescribe an antipsychotic medication or an antidepressant one.

There is no similar constraint on the definition of intellectual disability because the diagnosis has generally been used to decide on eligibility for the provision of supports rather than treatment in the medical sense. As noted *supra*, at 15-16, and n. 11, the problem of definition is explored from several perspectives in a book published by *amicus* AAIDD.

> "[Mental retardation], particularly mild MR, is a socially constructed disability category rather than a naturally constructed quasi-medical category. . . .
>
> "The term 'disability' originated in the vocational rehabilitation field and is used to indicate that a person needs significant short- or long-term supports in order to be able to hold down a job, if he can at all. It is, thus, a bureaucratic category, usually defined by a committee, which may be influenced by political and economic considerations as much as by 'science,' and *the decision as to where to draw the line* between disability and nondisability, based on an estimate of the amount of supports needed to function normally, *is relatively arbitrary*." Greenspan, Mental Retardation in the Real World: Why the AAMR Definition Is Not There Yet, in WIMR 167, 171 (emphasis added); see also Mossman, 33 N. M. L. Rev., at 265 ("line . . . is a changing and arbitrary one").

Amici AAIDD, *et al.*, insist that their definition is a "scientific standard." See Brief for American Association on Intellectual and Developmental Disabilities, *et al.*, as *Amici Curiae* 27. In reality, the details of the definition are supported by little science. Critics of the "paradigm shift" in the definition of mental retardation since the 1990s have noted the lack of empirical evidence, see, *e.g.*, Baumeister, Mental Retardation: Confusing Sentiment with Science, in WIMR at 96, and the influence of advocacy motives.

> "We are solemnly alerted by the Committee [citation] that the paradigm shift 'necessitates . . . significant changes in one's thinking' [citation] and that service delivery now focuses on 'strengths and capabilities of the person, normalized and typical environments, integrated services with supports, and the empowerment of individuals served' [citation]. Quite aside from the obvious imprecision of this grandiose terminology (or utter inanity, such as 'empowerment'), *blatant and outright advocacy has no standing in construction of a clinical nosology*, no matter how philosophically honorable and well intentioned in principle." *Id.*, at 109-110 (emphasis added); see also MacMillan, Siperstein, & Leffert, Children with Mild Mental Retardation: A Challenge for Classification Practices—Revised, in WIMR 197, 200 ("designed for the goal of advocacy for a particular ideology").

"From the beginning the definition of mental retardation has been subjected to political forces that have caused it to be modified. Whether these modifications are desirable or not will, in part, depend on the observer's political orientation." Detterman & Gabriel, *supra*, WIMR at 135.

The definitions, and indeed even the name, of the condition at issue here have varied widely over the

years and between organizations because there is little scientific basis for drawing the line at a particular place, no treatment decision to serve as a check, and heavy influence of advocacy motives to affect government decisions. Those decisions have always included the provision of educational and other support services. Since *Atkins*, they now include the decision of whether to hold murderers fully responsible for their crimes. Those definitions should therefore not be elevated to a constitutional mandate, overriding the decision of the people as expressed through the legislative process.

CONCLUSION

The decision of the Texas Court of Criminal Appeals should be affirmed.

September, 2016

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

RECORD AND BRIEF

Supreme Court, U.S.
FILED
AUG - 4 2016
OFFICE OF THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF INTERNATIONAL ORGANIZATIONS AND INDIVIDUALS INTERESTED IN MEDICAL EXPERTISE AND PSYCHIATRY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

(*Amici* Listed On Inside Cover)

PAUL HESSLER
Counsel of Record
LINKLATERS LLP
1345 Avenue of the Americas
New York, NY 10105
(212) 903-9132
paul.hessler@linklaters.com
Counsel for Amici Curiae

August 4, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Amici Organizations

British Medical Association

Canadian Academy of Psychiatry and the Law

The Central Institute of Mental Health (Germany)

Charité - Universitätsmedizin Berlin (Germany)

College of Psychiatrists of Ireland

Donald Beasley Institute (New Zealand)

Irish Mental Health Lawyers Association

Mental Health Foundation (United Kingdom)

New Zealand Medical Association

The Royal College of Psychiatrists (United Kingdom)

World Psychiatric Association

Amici Individuals

Professor Kate Diesfeld (New Zealand)

Associate Professor Kris Gledhill (New Zealand)

Professor Lawrence O. Gostin (United States)

Dr. Anthony Kearns (Ireland)

Professor Harry Kennedy (Ireland)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
Amici Organizations	1
Amici Individuals	6
STATEMENT OF THE CASE	8
SUMMARY OF ARGUMENT	8
ARGUMENT	11
1. *England*	12
Legal Sources	13
2. *Canada*	14
Legal Sources	15
3. *Australia*	16
Legal Sources	17
4. *New Zealand*	18
Legal Sources	19
5. *Ireland*	20
6. *Sweden*	20
Legal Sources	21
7. *Germany*	22
Legal Sources	23
8. *Japan*	24
Legal Sources	24

TABLE OF CONTENTS—Continued

Page

9. European *Court of Human Rights (the "ECtHR")* 25

CONCLUSION 26

TABLE OF AUTHORITIES

CASES Page(s)

Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) 10, 12

Roper v. Simmons, 543 U.S. 551 (2005) 10

Thompson v. Oklahoma, 487 U.S. 815 (1988) 10

CONSTITUTION

U.S. Const. amend. VIII 10

FOREIGN CASES

Bull v. Fulton (1942) 66 CLR 295 (Austl.)... 17

Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 2004, 2StR 367/04, BGHSt 49 (Ger.) 23

Burgess v. Leech, [2007] NSWSC (Austl.) ... 18

Hutchison Reid v. United Kingdom, IV Eur. Ct. H.R. 1 (2003) 25

In re Mr. S. HPDT 188/Psy08/86P, 12 Nov. 2008 (N.Z.) 18

Nytt Juridiskt [NJA] [Supreme Court] 1998-03-24 B3235-97 (Swed.), https://lagen.nu/dom/nja/1998s162 20

People (DPP) v. Kelly [2008] 3 IR 697 (Ir.) .. 20

R. v. Henderson [2010] EWCA (Crim) 1269 [2010] All ER (D) 125 (Eng.) 13, 14

R. v. Holdsworth [2008] EWCA (Crim) 971 [2008] All ER (D) 03 (Eng.) 13

TABLE OF AUTHORITIES—Continued

Page(s)

R. v. J.-L.J., 2000 SCC 51, [2000] 2 S.C.R. 600 (Can.) 15

R. v. Simpson, [1977] 35 CCC (2d) 33 (Can. Ont.) 16

R. v. Swain, 1991 CanLII 104, [1991] 1 S.C.R. 933 (Can.) 16

R. v. Trochym, 2007 SCC 6, [2007] 1 S.C.R. 239 (Can.) 15

Radu v. Germany, App. No. 20084/07 Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-119678 26

Rakevich v. Russia, App. No. 58973/00, Eur. Ct. H.R. (2003), http://hudoc.echr.coe.int/eng?i=001-61414 25

Saikō Saibansho [Sup. Ct.] July 17, 2000, 54/6 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 550 (Japan) 24

Shepherd v. R [2011] NZCA 666, [2012] 2 NZLR 609 19

SR v. R, [2011] NZCA 409, [2011] 3 NZLR 638 19

Timbury v. Coffee (1941) 66 CLR 277 (Austl.) 17

Winterwerp v. Netherlands, App. No. 6301/73, Eur. Ct. H.R. (1979), http://hudoc.echr.coe.int/eng?i=001-57597 25

TABLE OF AUTHORITIES—Continued

FOREIGN STATUTES — Page(s)

Canadian Criminal Code, R.S.C. 1985, c C-46 16

Health Practitioner Regulation National Law 2010 (ACT) s 38(1)(c) & (e) (Austl.).. 17

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 7(1) (N.Z.) 19

Sozialgesetzbuch Fünftes Buch [German Social Code Book V], § 2, ¶ 1 23

Workers' Compensation Act, R.S.B.C. 1996, c 492 (Can.) 16

Workers' Compensation Act, R.S.A. 2000, c W-15 (Can.) 16

Workplace Safety and Insurance Act, S.O. 1997, c 16, sched. A (Can.) 16

INTERNATIONAL CONVENTIONS

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, Art. 5(1)(e) 25

OTHER AUTHORITIES

114th German Medical Assembly 2011 in Kiel as amended by the 118th German Medical Assembly 2015 in Frankfurt am Main, *(Model) Professional Code for Physicians in Germany* (2015), *translation at* http://www.bundesaerztekammer.de/fileadmin/user_upload/downloads/pdf-Ordner/MBO/MBO_EN_Novellierung_2015.pdf.. 22

TABLE OF AUTHORITIES—Continued

Page(s)

Axel Boetticher et al., *Mindestanforderungen für Prognosegutachten* [Minimum requirements for prediction expert opinions], *Neue Zeitschrift für Strafrecht* [NStZ] [New Journal of Criminal Law] (2006) 23

British Psychological Society, *Guidance on the Assessment and Diagnosis of Intellectual Disabilities in Adulthood* (2015), http://www.rcpsych.ac.uk/pdf/ID%20assessment%20guidance.pdf 13

Canadian Medical Protective Association, *Medical-Legal Handbook for Physicians in Canada* (2016) 14

College of Family Physicians Canada, *Continuing Professional Development*, http://www.cfpc.ca/cpd/ (last visited July 31, 2016) 14

College of Physicians and Surgeons of Ontario, *The Practice Guide: Medical Professionalism and College Policies* (2007, revised online 2008), http://www.cpso.on.ca/uploadedFiles/policies/guides/PracticeGuideExtract_08.pdf 15

Declan McGrath, *Evidence* (2d ed. 2015) 20

Federation of Medical Regulatory Authorities of Canada, *Physician Practice Improvement* (2016), http://fmrac.ca/wp-content/uploads/2016/04/PPI-System_ENG.pdf 14

TABLE OF AUTHORITIES—Continued

Page(s)

General Medical Council, *Good Medical Practice*, (2013), http://www.gmc-uk.org/static/documents/content/GMP_.pdf..... 12

German Medical Association, *Bundesärztekammer Arbeitgsgemeinschaft der deutschen Ärztekammern* [Further Training Regulations of the German Medical Association] (2013), http://www.bundesaerztekammer.de/fileadmin/user_upload/downloads/_Muster-_Fortbildung sordnung _29052013.pdf. 22

Grainne Neilson, *Canadian Medical Association Code of Ethics Annotated for Psychiatrists* (Ottawa: Canadian Psychiatric Association, 2002)..... 15

Inspektionen för vård och omsorg [Health and Social Care Inspectorate] (Swed.), http://www.ivo.se (last visited Aug. 4, 2016)..... 21

Japan Medical Association, *2008 Ethical Guidelines for Physicians*, Japan Medical Association Journal vol. 52, no. 2, 75 (2009)..... 24

Japan Medical Association, *Principles of Medical Ethics*, http://www.med.or.jp/eng lish/about_JMA/principles.html (last visited July 28, 2016)..... 24

John Frederick Archbold, *Archbold: Criminal Pleading, Evidence and Practice* (P.J. Richardson ed., 1st supp., 64th ed., Sweet & Maxwell 2015)..... 13

TABLE OF AUTHORITIES—Continued

Page(s)

Jonatan Hedlund et al., *Svensk rättspsykiatri i förändring* [Swedish Forensic Psychiatry in Transition], Läkartidningen 2013; CCAU 20

Martin Borgeke, *Att bestämma påföljd för brott* [To determine the penalty for offense] (*Norstedts Juridik AB*, Stockholm, 2 uppl. 2012) (Swed.) 21

Medical Board of Australia, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (2014), http://www.plasticsurgery.org.au/linkservid/DA7B6C84-CDCC-54EC-11FCF1515915CBD0/showMeta/0/..... 16

Medical Council of New Zealand, *Good Medical Practice* (2016), https://www.mcnz.org.nz/assets/News-and-Publications/good-medical-practice.pdf..... 18

New Zealand Medical Association, *Code of Ethics for the New Zealand Medical Profession* (2014)..... 18

New Zealand Ministry of Health, *Guidelines for the Role and Function of Specialist Assessors under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (2004)..... 19, 20

New Zealand Psychologists Board, *Code of Ethics for Psychologists working in Aotearoa / New Zealand* (2012)..... 18

TABLE OF AUTHORITIES—Continued

Page(s)

Press Release Nr. 03/12. *Der Berufsverband Deutscher Psychologinnen und Psychologen e.V.* (BDP) [Professional Association of German Psychologists], *BDP nimmt Stellung zur Qualitätssicherung bei gerichtlichen Gutachten* [Comments on Quality Assessment of Judicial Expert Opinions] (Feb. 16, 2012), https://www.bdp-verband.de/bdp/presse/2012/03_gutachter.html 24

Qualitätsprüfungs-Richtlinie vertragsärztliche Versorgung des Gemeinsamen Bundesausschusses [BAnz] [Quality Assessment Guideline for Statutory Health Insurance of the Joint Federal Committee] (Apr. 18, 2006) (Ger.), https://www.g-ba.de/downloads/62-49216/RL_Qualitaetspruefung_2006-04-18.pdf 23

Socialstyrelsens information om diagnostiseringskoder [National Board of Health and Welfare's information concerning diagnostic codes] (Swed.), http://www.socialstyrlsen.se/klassificeringochkoder/diagnoskodericd-10 (last visited Aug. 4, 2016) 21

Socialstyrelsensförfattningssamling [SOSFS] 1996:14 *Rättspsykiatrisk undersökning* [official publications by governmental department] (Swed.) 21

Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen* [Penal Code] (63d ed. 2016) 23

STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37, *Amici* respectfully submit this brief *amicus curiae* in support of Petitioner.[1]

Amici are academic, medical or scientific institutions, organizations, associations, institutes, foundations and individuals.

Amici Organizations

BRITISH MEDICAL ASSOCIATION ("BMA"), founded in 1832, is the trade union and professional body for doctors in the United Kingdom. The association was initially established to create a "friendly and scientific" forum where doctors could advance and exchange medical knowledge. Following its transition into the BMA in 1855, its role expanded to become a professional body representing all medical practitioners. In this role, the BMA works with governments to lobby for improvements to health and health care. In addition it has established a research and publishing arm (for instance through its weekly journal, the British Medical Journal), in order to lead debate on key ethical, scientific and public health matters. Research conducted by the BMA often feeds into the development of new policy.

---

[1] Pursuant to Rule 37.3, both parties have filed letters with the Court granting blanket consent to *amicus curiae* briefs.

Pursuant to Rule 37.6, *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, its members or its counsel made a monetary contribution to its preparation or submission.

CANADIAN ACADEMY OF PSYCHIATRY AND THE LAW ("CAPL"), is the national body representing psychiatrists in Canada with an interest in the field of forensic psychiatry. Its members and affiliates are psychiatrists and professionals in related disciplines who practice in the area of forensic psychiatry, including faculty at various academic institutions, fellows and residents. CAPL supports its members in the application of their scientific and clinical expertise to legal issues in legal contexts embracing civil, criminal, correctional or legislative matters. Its members also have specialized expertise in the assessment and treatment of special populations, including young offenders, sexual offenders and violent offenders. CAPL promotes the advancement of clinical practice, education and research as they relate to forensic psychiatry.

THE CENTRAL INSTITUTE OF MENTAL HEALTH ("CIMH"), founded in Germany in 1975 as a model institution, is exemplary in successfully integrating innovative community patient care with state-of-the-art research and teaching in the field of psychiatry in partnership with institutions at home and abroad. A research institute of international acclaim and standing, it ranks among the three leading institutes of its kind in Europe. Across the entire spectrum of psychiatric disorders, the researchers at the CIMH conduct basic and clinical research to examine the ways in which mental illness occurs, develops and is most effectively treated.

CHARITÉ - UNIVERSITÄTSMEDIZIN BERLIN ("The Charité"), has a 300-year history of excellence in world-class medicine and research. The Charité is one of the largest university hospitals in Europe. All of its clinical care, research and teaching are delivered by

physicians and researchers of the highest international standard. The Charité lays claim to more than half of all German Nobel Prize winners in Physiology or Medicine.

The Department of Psychiatry and Psychotherapy at the Charité Campus Mitte comprises two sites, the Department of Psychiatry and Psychotherapy, Campus Charité Mitte and the Psychiatric University Hospital Charité at St. Hedwig Hospital. The Department of Psychiatry and Psychotherapy at Campus Mitte admits patients with all forms of psychiatric disorders including depression, borderline personality disorder, post-traumatic stress disorder and autism spectrum disorders. Professor Dr. med. Rainer Hellweg is Senior Consultant at the Department of Psychiatry and Psychotherapy at the Charité Campus Mitte and Head of the Forensic Psychiatric Expert Service.

COLLEGE OF PSYCHIATRISTS OF IRELAND, founded in 2009, is the professional, training and educational body for psychiatrists in the Republic of Ireland. The College of Psychiatrists of Ireland is the sole body recognized by the Medical Council of Ireland and the Irish Health Service Executive for the training of doctors to become specialists in psychiatry and for the continuing assurance of the career long competence of specialists in psychiatry. The College fulfils its mission through the education and training of psychiatrists, the provision of lifelong learning for psychiatrists, the advocacy for resources to support best practice in the delivery of mental health services, promoting best practice in education, training and research in psychiatry and providing public education in issues related to psychiatric illness, psychiatric services and mental health promotion.

DONALD BEASLEY INSTITUTE ("DBI"), was established in 1984 in Dunedin, New Zealand, and is recognized nationally and internationally as a leader in the field of intellectual disability research. The DBI was set up over thirty years ago in direct response to a lack of New Zealand research in the field of intellectual disability. Conducting and disseminating evidence-based and meaningful research continues to be central to the work of the DBI. Key research projects carried out by the DBI include the implementation of disability-specific legislation and policy in New Zealand and whether New Zealand, a signatory to the United Nations Convention on the Rights of Persons with Disabilities, has adequately considered and responded to the human rights and legal needs of people with intellectual disability.

IRISH MENTAL HEALTH LAWYERS ASSOCIATION ("IMHLA"), founded in 2007, is a membership composed of solicitors on the Mental Health Commission's legal representative panel and Mental Health Legal Practitioners and academics specializing in the area of mental health law. In addition to participating in the discussion on developments in the area of mental health law, the IMHLA also aims to encourage and maintain the highest standard of preparation, representation and practice in relation to mental health law. The IMHLA has previously made submissions to the Mental Health Commission in Ireland and to the government to challenge and clarify various aspects of proposed mental health legislation.

MENTAL HEALTH FOUNDATION, founded in 1949, works in the United Kingdom directly with people with mental health problems, learning disabilities and dementia, their families and services to help put policy into practice, carry out research and

development work and influence national and local policy.

NEW ZEALAND MEDICAL ASSOCIATION ("NZMA"), founded in 1886, is New Zealand's foremost pan-professional medical organization representing the collective interests of all doctors. The association's members come from all disciplines within the medical profession, and include specialists, general practitioners, doctors-in-training and medical students. The NZMA is a strong advocate on medico-political issues, with a strategic program of advocacy with politicians and officials at the highest levels. The key roles of the NZMA are: (i) to provide advocacy on behalf of doctors and their patients, (ii) to provide support and services to members and their practices, (iii) to publish and maintain the Code of Ethics for the profession and (iv) to publish the New Zealand Medical Journal.

THE ROYAL COLLEGE OF PSYCHIATRISTS ("RCPsych"), founded in 1841, is an independent professional membership organization, representing over 15,000 psychiatrists in the United Kingdom and internationally. The core purposes of the RCPsych are to set standards and promote excellence in psychiatry and mental health care; to lead, represent and support psychiatrists; and to work with patients, care-givers and other organizations interested in delivering high quality mental health services.

As a professional body, the RCPsych has a vital role in representing the expertise of the psychiatric profession to governments and other agencies. Public education is a core aspect of the RCPsych's activities; examples of its publications include the British Journal of Psychiatry, the BJPsych Bulletin, BJPsych Advances, Evidence-Based Mental Health, BJPsych Open and BJPsych International. Part of the

RCPsych's mission is to improve the scientific understanding of mental illness.

WORLD PSYCHIATRIC ASSOCIATION ("WPA") is an association of national psychiatric societies aimed at increasing the knowledge and skills necessary for work in the field of mental health and care for the mentally ill. It presently has 138 member societies, spanning 118 countries and representing more than 200,000 psychiatrists. The WPA organizes the triennial World Congress of Psychiatry, international and regional congresses and meetings, and thematic conferences. Its 70 scientific sections disseminate information and promote collaborative work in specific domains of psychiatry, including intellectual disability. It produces educational programs and book series, and developed ethical guidelines for psychiatric practice, including the Madrid Declaration (1996).

Amici Individuals

PROFESSOR KATE DIESFELD is a member of the California State Bar (inactive) and was a Staff Attorney at Protection and Advocacy, Inc. in Los Angeles. In England, she was Legal Supervisor of the Kent Law Clinic (Mental Health and Learning Disability) at the University of Kent. She also represented clients before the Mental Health Review Tribunal. She was Co-Chair of Auckland Disability Law's Advisory Committee. She is an Editorial Board Member of the Journal of Legal Medicine. She is co-editor of Involuntary Detention and Therapeutic Jurisprudence (2003, Ashgate) and Elder Law in New Zealand (2013, Thomson Reuters).

ASSOCIATE PROFESSOR KRIS GLEDHILL is an Associate Professor and Director of Clinical Legal Education at the Law School of AUT University, Auckland, New Zealand. He has published in the areas of criminal law, mental health law and human rights law. Before joining academia, he practiced in Virginia and then in England and Wales.

PROFESSOR LAWRENCE O. GOSTIN is University Professor at Georgetown University Law Center, where he is also the Founding O'Neill Chair in Global Health Law and the Faculty Director of the O'Neill Institute for National and Global Health Law. He is also Professor of Medicine at Georgetown University and Director of the World Health Organization Collaborating Center of Public Health Law & Human Rights. His books include Public Health Law: Power, Duty, Restraint (University of California Press, 2008) and Global Health Law (Harvard University Press, 2014).

DR. ANTHONY KEARNS is a consultant forensic psychiatrist in intellectual disability for the National Forensic Mental Health Service at the Central Mental Hospital, Ireland. He is also a clinical senior lecturer in forensic psychiatry of intellectual disability at Trinity College Dublin. Previously based in the United Kingdom for thirty years, he held posts as a consultant forensic psychiatrist in intellectual disability at the National Health Service and in the independent mental health sector. He has previously held honorary teaching posts at both the University of London and the University of Cambridge.

PROFESSOR HARRY KENNEDY BSc, MD, FRCPI, FRCPsych is Consultant Forensic Psychiatrist and Executive Clinical Director of National Forensic Mental Health Services at the Central Mental

Hospital, Ireland. He is also the Clinical Professor of Forensic Psychiatry at Trinity College Dublin. Professor Kennedy publishes extensively on psychiatric triage, routine outcome measurement, homicide, suicide, neuro-cognition, mental capacity and risk of violence. He has been called as an expert witness in many homicide cases and in human rights cases including 'slopping out' (prison conditions), marriage equality and pregnant prisoners. Professor Kennedy has also published a book on mental health law in Ireland.

STATEMENT OF THE CASE

For the purposes of this brief, *Amici* adopt the statement of facts in the Writ of Certiorari filed by Bobby James Moore and file this *amicus curiae* brief on behalf of Petitioner.

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals' (the "CCA") deliberate application to Mr. Moore of an outdated and non-clinical definition of intellectual disability is contrary to the way in which the medical professions and legal systems in many non-U.S. jurisdictions[2] (the "Non-U.S. Jurisdictions") apply medical standards.

---

[2] See authorities in Sections 1 to 8 summarizing the position in England, Canada, Australia, New Zealand, Ireland, Sweden, Germany and Japan, and authorities in Section 9 summarizing the position taken by the European Court of Human Rights. In addition, Counsel has reviewed the jurisprudence of a number of additional countries and found no support for the approach taken by the CCA. Those countries include: Belgium, France, Italy, Poland, Portugal, South Africa, South Korea and Spain. In many of these jurisdictions, the proposition advanced in this brief is considered obvious and therefore has not been explicitly addressed in jurisprudence.

As is to be expected, medical practitioners in the Non-U.S. Jurisdictions are ethically obliged to keep up-to-date with developments in their field and to apply current medical standards, techniques, and understanding in their practice of medicine. The logic underlying this obligation is self-evident. It would obviously be inappropriate for a patient receiving care for a longstanding injury to be treated with out-of-date medical techniques simply because such techniques were in use at the time that the injury was sustained. Counsel's review did not identify any jurisdictions in which medical practitioners were permitted to continue applying outdated medical standards.[3] On the contrary, such a practice would likely see the relevant practitioner disciplined for a serious breach of their ethical obligations. It is remarkable that the CCA chose to take an approach to the application of medical standards in a legal context that no member of the medical profession would be permitted to take in a medical context.

Medical standards are routinely used in many legal systems worldwide, particularly in the evaluation of expert medical evidence[4] and in the resolution of legal

---

[3] For the avoidance of doubt, there is a necessary distinction to be drawn between applying a current medical standard (as the CCA refused to do and which medical practitioners are mandated to do), and deciding how a patient will be treated in any given scenario (assuming that there is a range of options which are all consistent with current medical standards), which is often necessarily influenced by a range of considerations, not least cost.

[4] Counsel's review of the jurisprudence of the Non-U.S. Jurisdictions indicates that the strength and reliability of expert medical evidence commonly depends, among other things, on the extent to which it is based on generally accepted medical standards in the relevant field or widely recognized guidelines and protocols.

disputes. However, Counsel's review of the jurisprudence on the application of medical standards in the Non-U.S. Jurisdictions did not reveal any instances of a statute, treaty or convention requiring the application of, or a court in such jurisdictions applying (deliberately or otherwise), outdated medical standards, tests or guidelines, nor any decisions, guidance or any other materials suggesting that it would be appropriate to do so.[5]

U.S. law and practice has, on occasion, been informed by the laws and jurisprudence of other countries and the international community, including in the context of the Court's Eighth Amendment jurisprudence.[6] On the basis of the propositions espoused in the statutes and case law identified in this brief, and given the facts of this case, the Court should consider the patent unreasonableness of the CCA's application of the outdated *Briseno* test in Mr. Moore's case.

---

[5] With the obvious, and irrelevant, exception of the field of medical negligence where liability is necessarily assessed against the professional standards that prevailed at the time the liability arose (but not against a standard that had been superseded at the time the liability arose).

[6] *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (noting "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishment'"); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (noting "[the Court has] previously recognized the relevance of the views of the international community" in determining whether a punishment is cruel and unusual).

ARGUMENT

Huge strides have been made in medicine, and science more generally, over recent decades. Whenever developments occur and become widely accepted in the field of medicine, the medical professions in the Non-U.S. Jurisdictions rightly require their members to implement those developments and to apply such current standards in their practice of medicine. Such developments in medicine and science, frequently intersect with the law and, when such intersections occur, the courts must apply the most up-to-date medical standards on the relevant issue.

Contrary to the decision by the CCA, Counsel's review of the statutes, case law and procedural guidelines of the Non-U.S. Jurisdictions (which include both civil law and common law jurisdictions)[7] did not reveal any instance in which an outdated medical standard was relied on in the resolution of a disputed issue. Indeed, Counsel's wide-ranging review has not identified any statutes, treaties, conventions, case law or procedural guidelines which permit, encourage or even contemplate judicial disregard of accepted developments in medical knowledge in preference for abandoned medical standards.[8] The reason for this is obvious. Any court or system of justice that is applying a medical standard will benefit from applying the current standard; the quality of justice will inevitably be improved if it takes advantage of improvements in

---

[7] The statutes and case law of many of the Non-U.S. Jurisdictions do not provide guidance specifically in the context of capital punishment, because many of them do not have capital punishment or do not actively use it.

[8] Again, with the obvious, and irrelevant, exceptions of the field of medical negligence and the necessary rationing of health care because of issues of cost.

medical understanding. Conversely, the risks that are consequent on relying on outdated standards speak for themselves.

It is generally considered self-evident (and not worthy of discussion) in many Non-U.S. Jurisdictions that a court should not apply an outdated medical standard. Notwithstanding this, there are many examples of statutes and cases demonstrating that the courts of certain Non-U.S. Jurisdictions are expressly required not to, or are not bound to, apply medical standards abandoned by the medical community.

In summary, the CCA's application of the now abandoned medical standard adopted in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) is at odds with the ethical guidelines of the medical professions in the Non-U.S. Jurisdictions reviewed by Counsel. It is also at odds with the relevant statutes, procedural guidelines and case law of a number of Non-U.S. Jurisdictions, as demonstrated by the following jurisprudence, and is not supported by the jurisprudence of any of the other Non-U.S. Jurisdictions or any other guidance that Counsel has found.

1. England

All members of the medical profession in England are required to keep their professional knowledge and skills up-to-date, as mandated in guidance issued by the General Medical Council, the national public body which oversees and regulates the profession. General Medical Council, *Good Medical Practice*, ¶¶ 7-13 (2013), http://www.gmc-uk.org/static/documents/content/GMP_.pdf.

The British Psychological Society has published guidance for clinical psychologists who are required to determine whether an adult individual has an

"intellectual disability" under mental health and mental capacity legislation or for various purposes related to court proceedings. The Guidance expressly provides that psychologists must apply the criteria for determining "intellectual disability" that are set out in the most recently revised versions of the major classification systems (i.e., the American Association on Intellectual and Development Disabilities (AAIDD-11), the American Psychiatric Association (Diagnostic and Statistical Manual of Mental Disorders, DSM-5) and the World Health Organization (International Classification of Diseases, ICD-10)). The British Psychological Society, *Guidance on the Assessment and Diagnosis of Intellectual Disabilities in Adulthood*, 12-15 (2015), http://www.rcpsych.ac.uk/pdf/ID%20assessment%20guidance.pdf.

Legal Sources

The English Court of Appeal (the second highest appellate court in England and Wales) has recognized that medical and scientific knowledge continue to evolve, and as such, "[a]s knowledge increases, today's orthodoxy may become tomorrow's outdated learning." *R v. Holdsworth* [2008] EWCA (Crim) 971, [57], [2008] All ER (D) 03 (Eng.). Courts should thus only apply medical standards that represent the prevailing view of the medical community.

In this regard, in a leading recent case on the issue of medical evidence, England's Court of Appeal held that prior appellate jurisprudence does not provide authority for a medical proposition and that the English courts are required to make decisions as to the application of medical standards based on an assessment of the evidence before them. *See R v. Henderson* [2010] EWCA (Crim) 1269 [6], [2010] All ER (D) 125 (Eng.); John Frederick Archbold, *Archbold:*

Criminal Pleading, Evidence and Practice ¶¶ 10-49 (P.J. Richardson ed., 1st supp., 64th ed., Sweet & Maxwell 2015). The court in *Henderson* noted that:

> It is trite to observe that the conclusion of any court as to the medical evidence, whether at first instance or on appeal, is dependent upon the evidence before that court. No appellate jurisprudence could provide authority for a medical proposition . . . Previous legal authority cannot determine whether the conclusion of a medical report should be accepted or rejected. The most legal authority can do is present an accurate record of what was or was not accepted or propounded.

Henderson, [2010] EWCA (Crim) 1269 at [6], 2010 All ER (D) 125.

2. Canada

In Canada, physicians owe a duty to treat patients in accordance with current and accepted standards of practice. Canadian Medical Protective Association, *Medical-Legal Handbook for Physicians in Canada* 16 & 21 (2016). They must promote best practices in response to changes in scientific knowledge. Federation of Medical Regulatory Authorities of Canada, *Physician Practice Improvement*, 3 (2016), http://fmrac.ca/wp-content/uploads/2016/04/PPI-System_ENG.pdf. In addition, practitioners are mandated to keep current with medical and health care developments. College of Family Physicians Canada, *Continuing Professional Development*, http://www.cfpc.ca/cpd/ (last visited July 31, 2016).

Canadian physicians also have a positive duty to seek out new evidence and knowledge, and to apply it in practice. For example, physicians in Ontario are

expected to be aware of current developments in their field, which includes maintaining an awareness of relevant practice guidelines and implementing them as appropriate. College of Physicians and Surgeons of Ontario, *The Practice Guide: Medical Professionalism and College Policies*, 14 (2007, revised online 2008), http://www.cpso.on.ca/uploadedFiles/policies/guides/PracticeGuideExtract_08.pdf.

More specifically, the Canadian Psychiatric Association recognizes a psychiatrist's ethical obligation to remain abreast of developments in psychiatry. Grainne Neilson, *Canadian Medical Association Code of Ethics Annotated for Psychiatrists* 2 (Ottawa: Canadian Psychiatric Association, 2002).

Legal Sources

The Supreme Court of Canada (the highest court in Canada) recognizes that medical and scientific knowledge is not frozen in time, but may evolve based on improvements to existing bases of knowledge. *See, e.g., R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, ¶ 31 (Can.); *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, ¶ 34 (Can.). The Supreme Court held that "even if [a technique or science] has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted in evidence without first confirming the validity of those assumptions." *Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, ¶ 32. Thus, in Canadian cases, a medical standard which was accepted into evidence in a past case may subsequently be found to be inadmissible due to the later invalidity of its underlying assumptions that once may have been considered valid.

Although the term "mental disorder" is a legal concept under the Canadian Criminal Code, R.S.C. 1985, c C-46 (applying at the federal level), it includes a medical component that evolves with the advancement of medical knowledge. *R. v. Simpson*, [1977] 35 CCC (2d) 33, ¶ 43 (Can. Ont.), r v'd on other grounds, *R. v. Swain*, 1991 CanLII 104, [1991] 1 S.C.R. 933 (Can.).

The application of up-to-date standards and techniques is, in certain circumstances, a statutory requirement of law. Under provincial workers' compensation regimes in Canada, for example, mental disorders must be diagnosed according to the "most recent edition" of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"). *See, e.g.*, Workers' Compensation Act, R.S.B.C. 1996, c 492 (Can.); Workers' Compensation Act, R.S.A. 2000, c W-15 (Can.); Workplace Safety and Insurance Act, S.O. 1997, c 16, sched. A (Can.).

3. Australia

The Medical Board of Australia maintains a Code of Conduct which applies to all registered medical practitioners. The Code provides that practitioners must maintain and develop their knowledge, skills, and professional behavior, noting that professional development must continue throughout working life, "as science and technology develop and society changes." Medical Board of Australia, *Good Medical Practice: A Code of Conduct for Doctors in Australia*, ¶ 7.1 (2014), http://www.plasticsurgery.org.au/linkservid/DA7B6C84-CDCC-54EC-11FCF1515915CBD0/showMeta/0/. The Medical Board mandates continuing professional development, and a failure to satisfy the annual requirements can result in disciplinary pro-

ceedings, restrictions on the practitioner's registration, or a refusal to renew the practitioner's registration. *Health Practitioner Regulation National Law 2010* (ACT) s 38(1)(c) & (e) (Austl.)

Legal Sources

The High Court of Australia (the highest court in Australia) held that Australian courts are not bound by previously accepted medical evidence in the face of contrary medical standards and knowledge that prevail in the medical community. *See, e.g.*, *Timbury v. Coffee* (1941) 66 CLR 277 (Austl.); *Bull v. Fulton* (1942) 66 CLR 295 (Austl.). The High Court set forth this principle over seventy years ago in *Timbury v. Coffee*. In the context of determining whether a testator lacked testamentary capacity by reason of insane delusions, the court held that it was "not bound to go on applying views held over a century ago about mental disturbance and insanity and to disregard modern knowledge and understanding of such conditions." *Timbury*, (1941) 66 CLR at 284. The High Court emphasized this principle a year later in *Bull v. Fulton*, finding that "[i]t must be remembered . . . that some statements in [older judgments regarding mental diseases] are based on [then] current medical knowledge and that more is known about mental diseases now than then." *Bull*, (1942) 66 CLR at 339.

The High Court's view in *Coffee* was followed as recently as 2010 by the Supreme Court of New South Wales, in which the Supreme Court observed that "many reported cases contain judicial expositions of competency, and references in them to insanity, mental illness and delusions reflect the understanding of judges and in turn, medical opinion which changes from age to age." *Burgess v. Leech*, [2007] NSWSC ¶ 25 (Austl.).

4. New Zealand

The New Zealand Medical Association's Code of Ethics applies to all medical practitioners in New Zealand and is recognized as "the key source of advice on ethics for the medical profession." New Zealand Medical Association, *Code of Ethics for the New Zealand Medical Profession* 3 (2014). Principle 7 of the Code provides that practitioners must "[a]dhere to the scientific basis for medical practice while acknowledging the limits of current knowledge and contributing responsibly to innovation and research." *Id.* at 4. Doctors in New Zealand have an ongoing obligation to keep their knowledge and skills up-to-date and are required to complete continuing medical education on an annual basis in order to maintain awareness and understanding of current developments. Medical Council of New Zealand, *Good Medical Practice*, ¶ 83 (2016), https://www.mcnz.org.nz/assets/News-and-Publications/good-medical-practice.pdf.

The New Zealand Psychologists Board maintains a Code of Ethics which is applicable to all clinical and counselling psychologists practicing in New Zealand. The Code provides that psychologists must be "able to justify their professional decisions and activities in light of current psychological knowledge and standards of practice." New Zealand Psychologists Board, *Code of Ethics for Psychologists working in Aotearoa / New Zealand* ¶ 2.2.4 (2012). Indeed, disciplinary action may be taken where a psychologist applies an outdated standard. *See, e.g.*, *In re Mr. S. HPDT* 188/Psy08/86P, 12 Nov. 2008 at [119] (N.Z.) (New Zealand Health Practitioners Disciplinary Tribunal decision suspending a psychologist for eighteen months, reasoning that the practice in question "might have been used in the psychotherapy context up to the

early 1990s, but it is not supported by recent evidence based research and literature . . . ").

Legal Sources

The Court of Appeal of New Zealand (the second highest appellate court in New Zealand), in the case of *SR v. R*, accepted that a trial court was entitled to prefer the evidence of an expert who had used the most recent version of an intelligence scale in assessing the accused's intelligence over the evidence of an expert who had used an outdated version. *See SR v. R*, [2011] NZCA 409, [2011] 3 NZLR 638. The Court of Appeal agreed with the trial judge that the use of an outdated version of the relevant intelligence scale by an expert giving evidence in the trial "cast immediate doubt on the validity of the assessment made by [that expert]." *See id.* at [148].

The New Zealand Court of Appeal has also emphasized the need for scientific experts to follow "recognised guidelines or protocols . . . " in giving expert opinion evidence. *See Shepherd v. R* [2011] NZCA 666, [2012] 2 NZLR 609 at [112]. That proposition is recognized in New Zealand's Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, which defines "intellectual disability" by reference to tests "generally used by clinicians . . . " for measurement of deficits in adaptive functioning. Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 7(1) (N.Z.). In addition, the New Zealand Ministry of Health has established guidelines which are applicable to specialist assessors appointed for purposes of determining whether an individual has an "intellectual disability" under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. The Guidelines provide that "[t]he procedure is based on current clinical practice within New

Zealand . . . " New Zealand Ministry of Health, *Guidelines for the Role and Function of Specialist Assessors under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* 5 (2004).

5. Ireland

The leading textbook on the law of evidence in Ireland provides that in evaluating expert opinions, Irish courts will consider whether the views or methodology of an expert accord with those generally accepted in his or her field of expertise. Declan McGrath, *Evidence* 416 (2d ed. 2015); *see also People (DPP) v. Kelly* [2008] 3 IR 697 (Ir.).

6. Sweden

A peer-reviewed publication of the Swedish Medical Association provides that "as serious mental illness is a legal term, the medical conditions pertaining to the definition may vary over time." Jonatan Hedlund et al., *Svensk rättspsykiatri i förändring* [Swedish Forensic Psychiatry in Transition], Läkartidningen 2013; 110; CCAU. In accordance with this principle, the National Board of Health and Welfare ("NBHW") issues and updates instructions on the correct interpretation of "serious mental illness," with older instructions deemed outdated, and repealed, when updated instructions enter into force.

In a legal context, if a Swedish court doubts the conclusions drawn in a medical professional's psychiatric opinion, it may seek a second opinion from the NBHW. Inconsistencies between the two opinions are always resolved in favor of the NBHW so as to ensure that psychiatric opinions are always based on the most up-to-date versions of the NBHW's instructions. *Nytt Juridiskt* [NJA] [Supreme Court] 1998-03-24 p. 162 B3235-97 (Swed.), https://lagen.nu/dom/nja/1998s162.

Legal Sources

In Swedish courts, experts preparing psychiatric opinions are required to use standards set out in authoritative classification systems such as the ICD-10 (International Statistical Classification of Diseases and Related Health Problems) developed by the World Health Organization, and the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders) drafted by the American Psychiatric Association. *See* section 4.3 *Socialstyrelsensförfattningssamling* [SOSFS] 1996:14 *Rättspsykiatrisk undersökning* [official publications by governmental department] (Swed.); *see also* Martin Borgeke, *Att bestämma påföljd för brott* [To determine the penalty for offense], 310-312 (*Norstedts Juridik AB*, Stockholm, 2 uppl. 2012) (Swed.) (explaining that experts preparing psychiatric opinions are required to apply the most recently revised versions of the ICD and the DSM).

Such standards undergo regular revisions and once such standards are translated and implemented, the new standards are applied by experts in Sweden. If such up-to-date standards are not complied with, a remark or ordinance may be issued by the Health and Social Care Inspectorate; alternatively, in more serious cases, the Health and Social Care Inspectorate may seek to revoke the license of the expert or medical professional in question. *See Socialstyrelsens information om diagnostiseringskoder* [National Board of Health and Welfare's information concerning diagnostic codes] (Swed.), http://www.socialstyrlsen.se/klassificeringochkoder/diagnoskodericd-10 (last visited Aug. 4, 2016); *see also Inspektionen för vård och omsorg* [Health and Social Care Inspectorate] (Swed.), http://www.ivo.se (last visited Aug. 4, 2016).

7. Germany

There is a wealth of support in German non-legal sources for the proposition that doctors and other medical practitioners must have regard to the most up-to-date medical standards when exercising their professional duties.

The Model Professional Code of Conduct for Physicians in Germany ("*Berufsordnung der Bundesärztekammer für die in Deutschland tätigen Ärztinnen und Ärzte*") states that conscientious practice of the medical profession requires "in particular . . . compliance with the accepted state of medical knowledge." 114th German Medical Assembly 2011 in Kiel as amended by the 118th German Medical Assembly 2015 in Frankfurt am Main, *(Model) Professional Code for Physicians in Germany*, 9 (2015), *translation at* http://www.bundesaerztekammer.de/fileadmin/user_upload/downloads/pdf-Ordner/MBO/MBO_EN_Novellierung_2015.pdf. The Further Training Regulations of the German Medical Association (*Fortbildungsordnung der Bundesärztekammer*) provide that further training for doctors should "impart knowledge of new scientific findings, new developments in medical procedure and medical technology" such as is "considered necessary to preserve and advance professional expertise." German Medical Association, *Bundesärztekammer Arbeitgsgemeinschaft der deutschen Ärztekammern* [Further Training Regulations of the German Medical Association], 2 (2013), http://www.bundesaerztekammer.de/fileadmin/user_upload/downloads/_Muster-_Fortbildungsordnung_29052013.pdf.

Separately, the German Social Code ("*Sozialgesetzbuch*") stipulates that medical services provided by health insurance providers should "comply with . . .

the 'generally accepted state of medical knowledge' (*allgemein anerkannter Stand der medizinischen Erkenntnisse*) and must take into account . . . medical advancements." *Sozialgesetzbuch Fünftes Buch* [German Social Code Book V], § 2, ¶ 1. Moreover, reimbursement of the costs of medical treatment by health insurance providers is contingent on whether the treatment in question corresponded to the "current state of scientific knowledge" (*"jeweiliger Stand der wissenschaftlichen Erkenntnisse"*). *Qualitätsprüfungs-Richtlinie vertragsärztliche Versorgung des Gemeinsamen Bundesausschusses* [BAnz] [Quality Assessment Guideline for Statutory Health Insurance of the Joint Federal Committee] § 1 (Apr. 18, 2006) (Ger.), https://www.g-ba.de/downloads/62-492-16/RL_Qualitaetspruefung_2006-04-18.pdf.

Legal Sources

In Germany, an expert opinion used in courts is required to meet "approved scientific requirements" (*"anerkannte fachwissenschaftlichen Anforderungen"*) and has to be prepared in accordance with the "current scientific state of knowledge" (*"aktueller wissenschaftlicher Kenntnisstand"*). *See Bundesgerichtshof* [BGH] [Federal Court of Justice] Nov. 12, 2004, 2StR 367/04, BGHSt 49, 347, 352 (Ger.); *see also* Axel Boetticher et al., *Mindestanforderungen für Prognosegutachten* [Minimum requirements for prediction expert opinions], *Neue Zeitschrift für Strafrecht* [NStZ] [New Journal of Criminal Law] 537, 539 (2006); Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen* [Penal Code] § 20, ¶ 64b (63d ed. 2016). Furthermore, experts are required to continue their education (*"Fortbildung"*) to the extent necessary to maintain and develop the competence required in practicing their profession and to be up-to-date with the current state of knowledge.

Press Release Nr. 03/12, 3. *Der Berufsverband Deutscher Psychologinnen und Psychologen e.V.* (BDP) [Professional Association of German Psychologists], *BDP nimmt Stellung zur Qualitätssicherung bei gerichtlichen Gutachten* [Comments on Quality Assessment of Judicial Expert Opinions] (Feb. 16, 2012), https://www.bdp-verband.de/bdp/presse/2012/03_gutachter.html.

8. Japan

Japanese physicians have a duty to keep abreast of medical knowledge and technology and to support the advancement of medical practices. Japan Medical Association, *Principles of Medical Ethics*, Principle 1, http://www.med.or.jp/english/about_JMA/principles.html (last visited July 28, 2016). Recognizing that modern medicine is "ever progressing," the Japan Medical Association's Ethical Guidelines for Physicians requires physicians to complete continuing education on a regular basis. Japan Medical Association, *2008 Ethical Guidelines for Physicians*, Japan Medical Association Journal vol. 52, no. 2, 75 (2009).

Legal Sources

The Supreme Court of Japan (the highest court in Japan) stated that when assessing the value of an expert opinion as evidence, such assessment should "tak[e] into account new findings and others from scientific and technological developments in later years as well." *See* Saikō Saibansho [Sup. Ct.] July 17, 2000, 54/6 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 550 (Japan).

9. European Court of Human Rights (the "ECtHR")

In a leading case on the detention of persons of "unsound mind" under Article 5(1)(e) of the European Convention on Human Rights,[9] the ECtHR acknowledged that psychiatric knowledge does not stand still. *See Winterwerp v. Netherlands*, App. No. 6301/73, Eur. Ct. H.R. (1979), http://hudoc.echr.coe.int/eng?i=001-57597. In *Winterwerp v. Netherlands*, the ECtHR held that the term "persons of unsound mind" as used in the Convention is "not [a term] that can be given a definitive interpretation . . . [its meaning] is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes." *See id.* at 401.

The ECtHR has referred to and relied on the principle set out in *Winterwerp* on numerous occasions. In *Hutchison Reid v. United Kingdom*, the court recognized that the grounds on which detention may be ordered under domestic law may change during a lengthy period of confinement, given that "considerable time has elapsed and medical, psychiatric and legal developments have, inevitably, occurred." *Hutchison Reid v. United Kingdom*, IV Eur. Ct. H.R. 1, 20 (2003). The ECtHR further acknowledged in *Rakevich v. Russia*, citing *Winterwerp*, that "psychiatry is an evolving field . . . " *Rakevich v. Russia*, App.

---

[9] Article 5(1)(e) of the European Convention on Human Rights provides: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (e) the lawful detention . . . of persons of unsound mind . . . " European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5.

No. 58973/00, Eur. Ct. H.R. at 30 (2003), http://hudoc.echr.coe.int/eng?i=001-61414.

In the case of *Radu v. Germany*, the ECtHR stated that the meaning of the phrase "a person of unsound mind" is "continually evolving as research in psychiatry progresses." *Radu v. Germany*, App. No. 20084/07 Eur. Ct. H.R. at 90 (2013), http://hudoc.echr.coe.int/eng?i=001-119678.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to reverse the judgment of the Court of Criminal Appeals of Texas.

Respectfully submitted,

PAUL HESSLER
Counsel of Record
LINKLATERS LLP
1345 Avenue of the Americas
New York, NY 10105
(212) 903-9132
paul.hessler@linklaters.com

Counsel for Amici Curiae

August 4, 2016